

## COMMENTS

### TRAMPLING THE "MARKETPLACE OF IDEAS": THE CASE AGAINST EXTENDING *HAZELWOOD* TO COLLEGE CAMPUSES

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The federal courts long have recognized the nation's college campuses as uniquely a "marketplace of ideas."<sup>1</sup> With their aims of cultivating curiosity, creativity, and experimentation, colleges and universities throughout the country have broadly embraced the First Amendment.<sup>2</sup> At times, however, the free expression rights embodied in the First Amendment have clashed with administrative attempts to restrict the speech of college students. One such conflict erupted in 1994 at Kentucky State University (KSU or the "University"), when officials confiscated an estimated 2000 copies of the student yearbook because of objections to the content and quality of the publication.<sup>3</sup>

In the lawsuit arising from the censorship, *Kincaid v. Gibson*, two KSU students claimed that the University violated their First Amendment rights.<sup>4</sup> The suit went through a winding procedural history,<sup>5</sup>

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<sup>1</sup> The "marketplace of ideas" concept in federal court jurisprudence can be traced to Justice Holmes' dissenting opinion in *Abrams v. United States*. See 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

<sup>2</sup> The First Amendment, applied to the states through the Fourteenth Amendment, provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>3</sup> *Kincaid v. Gibson*, 236 F.3d 342, 345 (6th Cir. 2001) (en banc).

<sup>4</sup> *Id.*

<sup>5</sup> The Sixth Circuit first decided a related suit based on the same facts under the name *Cullen v. Gibson*, 124 F.3d 197, No. 96-6116, 1997 U.S. App. LEXIS 33186 (6th Cir.) (unpublished table decision) (per curiam), *cert. denied*, 522 U.S. 1117 (1998). For more explanation of the *Cullen* case, see *infra* note 127.

including an unreported district court opinion<sup>6</sup> affirmed by a Sixth Circuit panel.<sup>7</sup> The full Sixth Circuit, however, vacated the panel decision,<sup>8</sup> and after rehearing the case en banc, reversed the district court.<sup>9</sup> The standard the district court and the Sixth Circuit panel applied in *Kincaid* has caused alarm for student free speech advocates. Prior to these later-overtaken *Kincaid* decisions, that standard, enunciated in the seminal First Amendment case of *Hazelwood School District v. Kuhlmeier*,<sup>10</sup> had been applied only to certain speech in public elementary, middle, and high schools. The district court and the Sixth Circuit panel, however, extended the restrictive *Hazelwood* standard to certain speech at public colleges and universities. While the full Sixth Circuit rejected that analysis, the fear still exists that other courts may again attempt to extend the *Hazelwood* standard.

Under *Hazelwood*, a school may regulate "school-sponsored" speech, such as student publications, so long as the regulations "are reasonably related to legitimate pedagogical concerns."<sup>11</sup> The Court's reasoning in *Hazelwood* includes a public forum analysis, which federal courts often invoke to determine the scope of First Amendment rights in contexts involving public property.<sup>12</sup> Were the *Hazelwood* standard applied to public colleges and universities, the federal courts would drastically deviate from their long-standing tradition of recognizing the nation's campuses as a "marketplace of ideas."

Given the potential for such a deviation, this Comment argues that the *Hazelwood* standard should not, as a matter of law and policy, apply to public college campuses. Part I discusses the current free speech rights granted to public school students, including an examination of *Hazelwood* and related cases. Part II addresses the broader First Amendment rights that the federal courts historically have

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<sup>6</sup> *Kincaid v. Gibson*, No. 95-98 (W.D. Ky. Nov. 14, 1997), [http://www.splc.org/law\\_library.asp?id=17](http://www.splc.org/law_library.asp?id=17).

<sup>7</sup> 191 F.3d 719 (6th Cir. 1999).

<sup>8</sup> 197 F.3d 828 (6th Cir. 1999) (en banc).

<sup>9</sup> See 236 F.3d at 344 (determining that KSU officials violated the plaintiffs' First Amendment rights). After the en banc ruling, the University and the plaintiffs settled the case. Student Press Law Center, *News Flash: Background on Kincaid v. Gibson*, at <http://www.splc.org/kincaidbackground.asp> (last modified Mar. 1, 2000). As part of the settlement, the University agreed to release the yearbooks and to attempt to distribute them to former students. *Id.* The University also agreed to pay the student plaintiffs \$5000 each and attorney fees of \$60,000. *Id.*

<sup>10</sup> 484 U.S. 260 (1988).

<sup>11</sup> *Id.* at 273.

<sup>12</sup> *Id.* at 267 ("We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression.").

granted to college students. Part II also includes a description of the facts and decisions in *Kincaid v. Gibson*. In Part III, this Comment provides several reasons not to extend *Hazelwood* to college campuses. Finally, Part IV touches upon the likelihood that the Supreme Court could in fact apply *Hazelwood* to college and university students.

The Supreme Court, indeed, has not foreclosed the possibility of extending *Hazelwood* to colleges. In *Hazelwood*, the Court explicitly left open that possibility, stating, "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."<sup>13</sup> In examining the Supreme Court's open question, this Comment makes certain assumptions. First, it acknowledges that the *Hazelwood* standard, if it were extended to colleges, could apply only to public colleges, because, absent other factors mentioned below, the First Amendment applies only to governmental acts. As a result, private colleges and universities for the most part are, and would continue to be, free from following these First Amendment standards.<sup>14</sup> Second, this Comment assumes that college speech that could be restricted under *Hazelwood* otherwise could not be restricted under current First Amendment standards, such as those regulating obscenity or prohibiting speech that may incite imminent lawful action.<sup>15</sup> Finally, the Comment assumes that the *Hazelwood* standard as it currently applies to secondary schools is an appropriate standard.<sup>16</sup>

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<sup>13</sup> *Id.* at 274 n.7.

<sup>14</sup> See, e.g., *Grossner v. Trs. of Columbia Univ.*, 287 F. Supp. 535, 547-48 (S.D.N.Y. 1968) ("[R]eceipt of money from the State is not, without a good deal more, enough to make the [university] an agency or instrumentality of the government."). But see *Braden v. Univ. of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (holding that a state government's role in a private university, including through funding and oversight measures, transformed the university into a state actor); *Isaacs v. Bd. of Trs. of Temple Univ.*, 385 F. Supp. 473 (E.D. Pa. 1974) (finding that a private university was a state actor in part because it received some government funding); Student Press Law Center, *Private Schools and Press Freedom*, at <http://www.splc.org/legalresearch.asp?id=8> (1995) (noting that a court may protect free speech on a private college campus when "the school is heavily dependent on the state for its existence, relying on infusions of public money, financing and other viable means of support").

<sup>15</sup> See *Miller v. California*, 413 U.S. 15, 23-25 (1973) (delineating the extent to which obscene expression may be regulated); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (discussing decisions that allow regulation of speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

<sup>16</sup> In fact, many scholars rightly have argued that the *Hazelwood* standard is itself flawed and that public school students should have broader First Amendment rights. See, e.g., Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1342 (1991) ("The prevailing Supreme Court understanding of the educational mission of the schools as inculcation fails to adequately

## I. PUBLIC SCHOOL STUDENTS' FIRST AMENDMENT RIGHTS

The First Amendment free speech rights of students in secondary schools have been shaped largely by three Supreme Court cases: *Tinker v. Des Moines Independent School District*,<sup>17</sup> *Bethel School District v. Fraser*,<sup>18</sup> and *Hazelwood*. While *Tinker* started from the premise that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>19</sup> the Court has limited those rights sharply in *Fraser* and *Hazelwood*.

## A. Supreme Court Standards Applying to Public School Students' First Amendment Rights

*Tinker* is the proper starting point for an examination of the First Amendment rights of public school students.<sup>20</sup> The dispute in *Tinker*

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take into account the value of student speech in school settings."); see also Katherine Lush, Comment, *Expanding the Rights of Children in Public Schools*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 95, 123 (2000) ("To outright censor a newspaper, as the principal in the *Kuhlmeier* case arguably did, sends the wrong message to students about the role the Constitution and specifically the First Amendment freedoms should play in their lives.").

<sup>17</sup> 393 U.S. 503 (1969).

<sup>18</sup> 478 U.S. 675 (1986).

<sup>19</sup> 393 U.S. at 506.

<sup>20</sup> For more in-depth examinations of *Tinker*, see Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379 (1995), discussing the role of *Tinker* in the development of autonomy ideology in public schools; Beverly L. Hall, *Parameters of Student Conduct*, 69 ST. JOHN'S L. REV. 515, 515 (1995), describing how twenty-five years after *Tinker* "New York City public school educators continue to balance an individual student's rights against their responsibility to provide all children a safe and orderly environment in which to learn"; James M. Henderson, Sr., *The Public Forum Doctrine in Schools*, 69 ST. JOHN'S L. REV. 529, 532 (1995), stating that "the principal danger to First Amendment rights specifically recognized and granted by *Tinker* is the application of the public forum doctrine in the school setting"; Stanley Ingber, *Liberty and Authority: Two Facets of the Incultation of Virtue*, 69 ST. JOHN'S L. REV. 421, 425-26 (1995), noting that "[a]lthough *Tinker* has never been overruled, its significance has been severely eroded" and "[t]he legal trend is unmistakably toward increasing deference to the decisions of school administrators"; Elliot M. Minberg, *A Practical Approach to Tinker and Its Progeny*, 69 ST. JOHN'S L. REV. 519 (1995), explaining what a practitioner can do when he wants to maximize students' rights under *Tinker* and subsequent cases; Michael Rebell, *Tinker, Hazelwood and the Remedial Role of the Courts in Education Litigation*, 69 ST. JOHN'S L. REV. 539, 549 (1995), proposing that courts, in deciding issues such as those in *Tinker*, should bring "a broad representative group of people from the affected community together, and set up a special master, a facilitator, or some representative of the court, as a liaison between the community and the court to ensure that there is a proper dialogue"; and Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*,

arose when three students in Des Moines, Iowa, wore black armbands to school to protest the Vietnam War.<sup>21</sup> When the schools' principals got wind of the plan, they adopted a policy that any student wearing an armband would be asked to remove it or face suspension.<sup>22</sup> Aware of the policy, the students wore their armbands to school, resulting in suspensions until they agreed to return without their armbands.<sup>23</sup> Claiming a violation of their First Amendment rights, the students sued.<sup>24</sup>

In a 7-2 decision, the Supreme Court found a First Amendment violation. The Court recognized that First Amendment rights must be balanced, "in light of the special characteristics of the school environment,"<sup>25</sup> with the rights of school officials "to prescribe and control conduct in the schools."<sup>26</sup> Weighing these conflicting propositions, the Court held that student speech may only be regulated if it "would substantially interfere with the work of the school or impinge upon the rights of other students."<sup>27</sup>

Applying this standard, the Court found no evidence of disruption.<sup>28</sup> The Court noted, for example, that "[o]nly a few of the 18,000

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69 ST. JOHN'S L. REV. 365, 377 (1995), explaining subsequent cases that redefined *Tinker* and concluding that "the courts need to appreciate the generality of *Tinker*, and they need to appreciate the detail of *Hazelwood*." Further discussion of *Tinker* may be found in Edgar Bittle, *The Tinker Case: Reflections Thirty Years Later*, 48 DRAKE L. REV. 491, 506 (2000), concluding that Justice Black's dissent in *Tinker* has become the majority view in light of *Fraser* and *Hazelwood*, and because violence in schools has "tilted the balance of the scales of justice toward more deference to disciplinary actions by school authority"; Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 530 (2000), reviewing caselaw since *Tinker* and concluding that "[t]he judiciary's unquestioning acceptance of the need for deference to school authority leaves relatively little room for protecting students' constitutional rights"; Kay S. Hymowitz, *Tinker and the Lessons from the Slippery Slope*, 48 DRAKE L. REV. 547, 565 (2000), stating that "anticultural assumptions behind decisions like . . . *Tinker*, far from advancing freedom, threaten its foundations"; and Dan L. Johnston, *What the Pigeons Have Done to My Statue*, 48 DRAKE L. REV. 519, 526 (2000), discussing how *Tinker* continues to "empower[] and encourage[] free women and men among America's students, educators, and in its judiciary" to embrace the classroom as a "marketplace of ideas."

<sup>21</sup> *Tinker*, 393 U.S. at 504.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 506.

<sup>26</sup> *Id.* at 507.

<sup>27</sup> *Id.* at 509.

<sup>28</sup> *Id.* In dissent, Justice Black reached the opposite conclusion. Justice Black argued that the determination of what speech should be tolerated in secondary schools should be left to the individual schools, and not to the courts. See *id.* at 515 (Black, J.,

students in the school system wore the black armbands," and "[o]nly five students were suspended."<sup>29</sup> Highlighting the constitutional importance of free speech, the Court stated:

In our system, students may not be regarded as closed circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>30</sup>

The broad free speech rights granted to public school students under *Tinker* began facing restrictions with the Supreme Court's *Fraser* decision nearly two decades later. In *Fraser*, the Court considered the free speech rights of a public high school student who had delivered a sexually suggestive speech during a school assembly.<sup>31</sup> After the student, Matthew N. Fraser, delivered his speech, he faced suspension for violating a school policy prohibiting the use of obscene language.<sup>32</sup> Fraser served a two-day suspension and filed suit.<sup>33</sup>

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dissenting) ("The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils . . . is in ultimate effect transferred to the Supreme Court."). Justice Black also asserted that the wearing of armbands in fact caused disruptions in the schools. See *id.* at 517-18 (Black, J., dissenting) (stating that the armbands "took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war").

<sup>29</sup> *Id.* at 508.

<sup>30</sup> *Id.* at 511. The lower federal courts have followed *Tinker* in some instances and strayed from it in others. As Chemerinsky explains:

There are literally dozens of lower federal court cases over the last thirty years dealing with student speech. They follow no consistent pattern; some are quite speech-protective and follow *Tinker's* philosophy as well as its holding, while others are very restrictive of student speech and treat *Tinker* as if it has been overruled.

Chemerinsky, *supra* note 20, at 542.

<sup>31</sup> Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677-78 (1986).

<sup>32</sup> *Id.* Fraser's speech was as follows:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

*Id.* at 687 (Brennan, J., concurring).

<sup>33</sup> *Id.* at 678-79.

The Supreme Court upheld Fraser's punishment by a 7-2 decision, and distinguished *Tinker* by noting that the expression in *Tinker* could not be construed as associated with the school, while Fraser's speech was given as part of an official school activity.<sup>34</sup> The Court further distinguished the speech in *Tinker* as "political" speech, thus reasoning that the *Tinker* standard need not apply to nonpolitical speech such as Fraser's.<sup>35</sup> Rather, the Court emphasized that "schools must teach by example the shared values of a civilized social order" and, as a result, can prohibit "lewd, indecent, or offensive speech."<sup>36</sup>

The Court used similar reasoning two years later in *Hazelwood*.<sup>37</sup> While not explicitly overruling *Tinker*, the Court, in a 5-3 decision, developed a far more stringent First Amendment standard for certain public school speech. Of concern to the Court was the decision by the principal of Hazelwood East High School to censor two pages of an issue of the school's student newspaper, *Spectrum*.<sup>38</sup> The newspaper, produced as part of a journalism course, was subsidized largely with funds from the school district and was subject to various oversight mechanisms.<sup>39</sup> When the newspaper staff submitted proofs of the issue to the principal, he ordered the removal of two articles, one describing three Hazelwood East students' experiences with pregnancy, and the other discussing the impact of divorce on students at the school.<sup>40</sup>

Adopting a public forum analysis, the Supreme Court held that the principal's actions did not violate the students' First Amendment rights.<sup>41</sup> While the Court acknowledged the broad First Amendment

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<sup>34</sup> See *id.* at 685-86 ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself . . .").

<sup>35</sup> See *id.* at 680 (noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case").

<sup>36</sup> *Id.* at 683. The Court found ample evidence that Fraser's speech was offensive: "The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person." *Id.*

<sup>37</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>38</sup> *Id.* at 262.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 263. The principal voiced several concerns, such as criticism of a father in the divorce article and the potential that the girls in the pregnancy article could be identified despite the use of false names. *Id.* The pages containing the pregnancy and divorce articles also included articles on teenage marriage, runaways, and juvenile delinquents, as well as a general piece on teenage pregnancy. *Id.* at 264 n.1. Although the principal had no objection to these articles, they too were omitted. *Id.*

<sup>41</sup> *Id.* at 276.

rights granted in *Tinker*, it also recognized both the restrictions placed on those rights in *Fraser* and the need for schools to instill civic values in students.<sup>42</sup> In reaching its conclusion, the Court determined that the school newspaper could not be considered a public forum.<sup>43</sup> In previous cases, the Court found three types of forums, each of which has its own First Amendment standards. In a traditional public forum, such as a public park,<sup>44</sup> the government has a very limited ability to limit free speech rights. Only those restrictions that are narrowly drawn to serve a compelling state interest will pass First Amendment scrutiny.<sup>45</sup> On the opposite end are nonpublic forums, such as military bases<sup>46</sup> and prisons,<sup>47</sup> in which the government may impose extensive restrictions on First Amendment rights, so long as the restrictions are reasonable.<sup>48</sup> Finally, in the middle are limited public forums, where the government's rights are as limited as those in a public forum once it is determined that the government has opened up the forum for expressive use.<sup>49</sup>

Applying this analysis, the Court in *Hazelwood* stated that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"<sup>50</sup> The Court explained that "[t]he government does not create a public forum by inaction or by permit-

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<sup>42</sup> See *id.* at 266-67 (discussing First Amendment law in light of *Tinker* and *Fraser*).

<sup>43</sup> See *id.* at 267 ("The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939))).

<sup>44</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("Public streets and parks fall into this category [of traditional public forums].").

<sup>45</sup> See *id.* at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

<sup>46</sup> See *Greer v. Spock*, 424 U.S. 828, 838 (1976) (determining that military bases, unlike municipal streets and parks, have not "traditionally served as a place for free public assembly and communication of thoughts by private citizens").

<sup>47</sup> See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134-36 (concluding that a "prison is most emphatically not a 'public forum'").

<sup>48</sup> See *Hazelwood*, 484 U.S. at 267 (stating that if a forum is deemed nonpublic, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community").

<sup>49</sup> See *id.* (noting that a government creates a limited public forum "only by intentionally opening a nontraditional forum for public discourse" (quoting *Cornelius*, 473 U.S. at 802)). For a detailed discussion of the public forum doctrine, see *infra* Part III.C.

<sup>50</sup> 484 U.S. at 267 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).



ting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."<sup>51</sup> With this public forum standard established, the Court turned to the intent of Hazelwood East officials. First, the Court noted that *Spectrum's* purpose was largely educational, in part because it was produced by a journalism class taught by a faculty member during regular class hours and for academic credit.<sup>52</sup> The Court also emphasized that the course's teacher had significant involvement in the newspaper's production, ranging from the selection of editors to the editing of stories.<sup>53</sup> The Court found additional evidence insufficient to show that the school intended *Spectrum* to be a public forum.<sup>54</sup> For example, a policy statement published in an issue of *Spectrum*, declaring that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment," did not reflect an intent of the school's administration to expand students' free speech rights by converting the newspaper into a public forum.<sup>55</sup>

The Court then proceeded to distinguish *Tinker* on the grounds that the speech in *Tinker* was personal while the speech in *Hazelwood* was "school-sponsored."<sup>56</sup> Addressing the distinction, the Court stated:

Educators are entitled to exercise greater control over this second form of student expression [school-sponsored speech] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," [*Bethel Sch. Dist. v. Fraser*, 478 U.S. [ 675,]

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<sup>51</sup> *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

<sup>52</sup> *See id.* at 268 (stating that, pursuant to school policy, production of *Spectrum* was part of the educational curriculum and was a regular classroom activity). The Hazelwood East Curriculum Guide described the course in which *Spectrum* was produced, Journalism II, as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* at 269-70 (dismissing the evidence relied on by the appellate court in finding *Spectrum* to be a public forum).

<sup>55</sup> *Id.* at 269. The Court also found unconvincing the fact that students had some editorial control over *Spectrum*, reasoning that such responsibility was merely in line with the educational objectives of the course. *Id.* at 270. Additionally, a school policy stating that the school would not restrict the First Amendment rights of student publications was offset by another school policy statement that such publications were "developed within the adopted curriculum and its educational implications." *Id.* at 269.

<sup>56</sup> *Id.* at 271. School-sponsored speech, the Court noted, could include speech in student publications, theatrical productions, and other similar expressive activities that "the public might reasonably perceive to bear the imprimatur of the school." *Id.*

685 [(1986)], not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," *Tinker* [ *v. Des Moines Indep. Sch. Dist.*], 393 U.S.[ 503,] 509[ (1969)], but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.<sup>57</sup>

The Court also emphasized that schools must consider the maturity of the audience exposed to the student speech and must perform their role as one of the principal instruments in instilling cultural values in children.<sup>58</sup> With such principles in mind, the Court announced a new standard for evaluating the constitutionality of "school-sponsored" speech, such as that found in *Hazelwood*, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>59</sup>

With this new standard in hand, the Court found that Hazelwood East's principal acted reasonably in censoring *Spectrum*.<sup>60</sup> Addressing the potential identification of the girls in the pregnancy article, the Court stated that the principal "could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students."<sup>61</sup> In addition, the principal reasonably could have believed that the "frank talk" on sexual topics in the pregnancy article "was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters."<sup>62</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 272.

<sup>59</sup> *Id.* at 273. The Court also stated, "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Id.*

<sup>60</sup> *Id.* at 276.

<sup>61</sup> *Id.* at 274.

<sup>62</sup> *Id.* at 274-75. In a vigorous dissent, Justice Brennan, joined by Justices Marshall and Blackmun, reached the opposite conclusion. Justice Brennan argued that free expression serves important interests in the education of children. *Id.* at 277 (Brennan, J., dissenting). While acknowledging that schools are responsible for instilling cultural values in children, Justice Brennan stated, "We have not, however, hesitated to intervene where their decisions run afoul of the Constitution." *Id.* at 279 (Brennan, J., dissenting). Justice Brennan also expressed concern over schools that oppose student expression, even when it does not interfere with the school's functioning, merely because it conflicts with the school's message. *Id.* at 279-80 (Brennan, J., dissenting). After rejecting the majority's standard and applying the *Tinker* standard, Justice Brennan concluded that the principal's censorship was clearly unconstitutional. *See id.* at

### B. Public School Students' Free Speech Rights in the Lower Federal Courts

The lower federal courts and most state courts have applied the *Hazelwood* standard faithfully. Consequently, student speech is now significantly circumscribed in the federal courts.<sup>63</sup> Indeed, the courts rarely find against schools in student free speech cases, notwithstanding the variety of contexts in which they are brought.<sup>64</sup> The Third Cir-

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289-90 (Brennan, J., dissenting) ("Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent 'material[] disrupt[ion of] classwork' . . . ." (alteration in original) (quoting *Tinker*, 393 U.S. at 513)). In sweeping language, Justice Brennan prefaced his dissent by stating, "When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson." *Id.* at 277 (Brennan, J. dissenting). He concluded his dissent in much the same way: "The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today." *Id.* at 291 (Brennan, J., dissenting).

<sup>63</sup> See, e.g., *Broussard v. Sch. Bd.*, 801 F. Supp. 1526, 1532-37 (E.D. Va. 1992) (upholding the suspension of a middle school student who wore a shirt stating "Drugs Suck!" in school); *DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744, 748-52 (E.D. Mich. 1992) (finding that a teacher did not violate a second-grade student's First Amendment rights when the teacher prohibited the student from showing the class a videotape of herself singing a religious song), *aff'd*, 1 F.3d 1240 (6th Cir. 1993); *Duran v. Nitsche*, 780 F. Supp. 1048, 1056 (E.D. Pa. 1991) (holding that a school did not violate the First Amendment rights of a fifth-grade student when it prohibited her from distributing a religious survey at school), *vacated*, 972 F.2d 1331 (3d Cir. 1992). But see *McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415, 1424 (W.D. Okla. 1992) (finding that students' T-shirts stating "[t]he best of the night's adventures are reserved for people with nothing planned" were protected by the First Amendment); *Romano v. Harrington*, 725 F. Supp. 687, 689 (E.D.N.Y. 1989) (declining to apply the *Hazelwood* standard to a high school extracurricular student newspaper).

<sup>64</sup> See *Hafen & Hafen*, *supra* note 20, at 396-97 ("Although there are exceptions, most lower courts have read *Hazelwood* as clarifying educators' authority to control student expression for the sake of preserving the institutional and educational integrity of public schools. These courts have also chosen to extend *Hazelwood's* application beyond student newspaper cases and even student speech cases." (footnote omitted)). As Dan Johnston summarized:

Federal courts since *Tinker* have upheld the disciplining of public school students for the content of speeches during an election campaign for student council president, for the content of a student's valedictory speech, for selecting "The Power of God" as a topic for a classroom presentation, for wanting to show a video tape of a religious song in class "show and tell," for wearing a shirt with an anti-drug message, and for wearing t-shirts protesting school policies.

Johnston, *supra* note 20, at 520 (footnotes omitted). Before *Hazelwood*, the lower federal courts, in line with *Tinker*, granted far greater First Amendment rights to public school students. See, e.g., *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (holding that school officials violated the free speech rights of students by punishing them for producing a satirical publication largely off school grounds). But see *Seyfried v. Walton*, 668 F.2d 214, 215-17 (3d Cir. 1981) (finding no First Amendment violation when a high school principal cancelled a dramatic production because of its sexual

cuit, for example, indicated in *Brody v. Spang* that a public high school graduation ceremony is unlikely to be considered a public forum.<sup>65</sup> The court followed *Hazelwood* because the "process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in *Hazelwood* than the broad group access policies considered in [other relevant Supreme Court cases]."<sup>66</sup>

Even when the expression at issue involves no vocal speech, such as the attire students wear in school, First Amendment rights in schools have been curtailed. The Sixth Circuit, for example, upheld a high school administrator's decision prohibiting a student from wearing Marilyn Manson T-shirts.<sup>67</sup> Applying the tripartite structure of *Tinker*, *Fraser*, and *Hazelwood*, the court found that the shirts were offensive and could cause a substantial disruption in the school, and thus held that the school constitutionally could prohibit them.<sup>68</sup> The Seventh Circuit reached a similar conclusion in *Baxter v. Vigo County School Corp.* when it upheld the decision of a school principal who prohibited a student from wearing shirts with messages such as "Un-fair Grades" and "Racism."<sup>69</sup> The Ninth Circuit, by contrast, granted broader First Amendment freedom to students when it upheld their rights to wear buttons in support of striking teachers.<sup>70</sup>

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theme).

<sup>65</sup> See 957 F.2d 1108, 1117-20 (3d Cir. 1992) (considering to what extent religious speech may be included in a public high school graduation ceremony). Other circuits have also addressed First Amendment rights of students at official school events. In *Poling v. Murphy*, the Sixth Circuit held that the First Amendment did not protect a high school student who mocked a school official during a campaign speech delivered at a school assembly. 872 F.2d 757, 758 (6th Cir. 1989); see also *Henerey v. City of St. Charles, Sch. Dist.*, 200 F.3d 1128, 1133 (8th Cir. 1999) (holding that a student election in a public school "was conducted within the context of a nonpublic forum").

<sup>66</sup> 957 F.2d at 1119.

<sup>67</sup> *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468-71 (6th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001). Marilyn Manson is a popular hard rock performer known for his dark lyrics and drug use. *Id.* at 466. The front of one of the T-shirts depicted a three-faced Jesus, with the words "See No Truth. Hear No Truth. Speak No Truth." *Id.* at 467. The back displayed the word "BELIEVE," with the letters "LIE" highlighted. *Id.* When the student wore the T-shirt to school, an administrator ordered him to turn the shirt inside out, go home and change, or leave school and be deemed truant. *Id.* The student left school but came back the next four school days, each time wearing a new Marilyn Manson T-shirt. *Id.*

<sup>68</sup> *Id.* at 469-71.

<sup>69</sup> See *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994) (concluding that the rights the principal allegedly violated were not "clearly established" at the time and therefore he was entitled to qualified immunity).

<sup>70</sup> *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992). The

*Hazelwood* also has come up in the context of school mascots. In *Crosby v. Holsinger*, the Fourth Circuit upheld a high school principal's decision to eliminate "Johnny Reb" as the school's mascot because it offended black students and parents.<sup>71</sup> The court held that, under *Hazelwood*, a school need not associate itself with certain expression.<sup>72</sup> The court stated:

A school mascot or symbol bears the stamp of approval of the school itself. Therefore, school authorities are free to disassociate the school from such a symbol because of educational concerns. Here, Principal Holsinger received complaints that Johnny Reb offended blacks and limited their participation in school activities, so he eliminated the symbol based on legitimate concerns.<sup>73</sup>

As the Fourth Circuit's holding thus makes clear, the lower federal courts freely apply *Hazelwood* to many forms of speech.

### C. Public School Students' Free Speech Rights in the State Courts

In the state courts, meanwhile, public school students' free speech rights have been limited in some jurisdictions to the same extent as in the federal courts, while they are broader in other state jurisdictions.<sup>74</sup> Two states, Arkansas and Kansas, have codified laws that grant public school student publications broader First Amendment rights than

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Ninth Circuit has been less restrictive in its First Amendment analysis than its sister courts. See Johnston, *supra* note 20, at 520-21 ("Only the Ninth Circuit seems to have solidly embraced *Tinker* in reversing the discipline imposed against students for wearing 'scab' buttons during a teacher strike."); see also Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988) (holding unconstitutional a high school policy requiring administrative prepublication review of non-school-sponsored student-written material).

<sup>71</sup> 852 F.2d 801, 803 (4th Cir. 1988).

<sup>72</sup> See *id.* at 802 (reaffirming that "school officials need not sponsor or promote all student speech"). Expression that is religious in nature presents additional particular difficulties. In such instances, not only must a student overcome *Hazelwood*, but he also must confront the First Amendment's Establishment Clause, which prohibits state-sponsored religion. Thus, in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1532 (7th Cir. 1996), the Seventh Circuit considered an elementary school principal's decision to prohibit a student from giving his classmates invitations to a religious meeting to be held at a church his family attended. Applying *Hazelwood*'s analysis in determining that the school was a nonpublic forum, the court found no free speech violation. *Id.* at 1539-40. A claim that the school's policy regulating distribution of materials violated the Establishment Clause was also rejected. *Id.* at 1543-54.

<sup>73</sup> *Holsinger*, 852 F.2d at 802.

<sup>74</sup> The only state court case to rule specifically on the applicability of *Hazelwood* to a school-sponsored student newspaper is *Desilets v. Clearview Regional Board of Education*, 647 A.2d 150, 151-53 (N.J. 1994), finding that school officials' censorship of a student newspaper failed to meet the *Hazelwood* standards, thus finding a First Amendment violation.

they would be entitled to under *Hazelwood*.<sup>75</sup> Four additional states have passed laws that not only give broader rights to student publications, but to all other forms of student expression as well.<sup>76</sup> Of those states, only California had codified the *Tinker* standard prior to *Hazelwood*.<sup>77</sup> Colorado, Iowa, and Massachusetts provide similar free speech rights for public school students.<sup>78</sup> Two additional states, Pennsylvania

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<sup>75</sup> In Arkansas, the Arkansas Student Publications Act only prohibits publication of materials:

- (1) . . . that are obscene as to minors, as defined by state law;
- (2) . . . that are libelous or slanderous, as defined by state law;
- (3) . . . that constitute an unwarranted invasion of privacy, as defined by state law; or
- (4) . . . that so incite students as to create:
  - (A) [a] clear and present danger of the commission of unlawful acts on school premises[,] or
  - (B) [t]he violation of lawful school regulations[,] or
  - (C) [t]he material and substantial disruption of the orderly operation of the school.

ARK. CODE ANN. § 6-18-1204 (Michie 1999). Kansas has passed a similar law, the Kansas Student Publications Act, which states in part, "The liberty of the press in student publications shall be protected. School employees may regulate the number, length, frequency, distribution and format of student publications. Material shall not be suppressed solely because it involves political or controversial subject matter." KAN. STAT. ANN. § 72-1506(a) (1992). The Act further provides that published expression that "creates material or substantial disruption of the normal school activity is not protected by this act." *Id.* § 72-1506(c). This provision essentially codifies the *Tinker* standard in lieu of the *Hazelwood* standard. *Holsinger*, 852 F.2d at 802.

<sup>76</sup> See Student Press Law Center, *SPLC Law Library*, at [http://www.splc.org/law\\_library.asp](http://www.splc.org/law_library.asp) (last visited Mar. 23, 2002) (listing California, Colorado, Iowa, and Massachusetts as having statutes addressing free speech protection in public schools).

<sup>77</sup> *Hafen & Hafen*, *supra* note 20, at 406 n.149. California's Student Free Expression Law only restricts expression which is "obscene, libelous, or slanderous" or which "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school." CAL. EDUC. CODE § 48907 (West 1993). The law also provides free expression parameters specifically for student publications, including the right to be free from prepublication review. *Id.*; see also *Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trs.*, 40 Cal. Rptr. 2d 762, 772 (Ct. App. 1995) ("[T]he California Supreme Court has taken a different approach than the United States Supreme Court when analyzing the government's ability to regulate the content of its own sponsored publications."); *Leeb v. DeLong*, 243 Cal. Rptr. 494, 502 (Ct. App. 1988) (holding that California law allows censorship of a high school newspaper that may contain defamatory material but does not allow censorship "as a matter of taste or pedagogy").

<sup>78</sup> See COLO. REV. STAT. § 22-1-120(2) (2001) ("If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school."); IOWA CODE ANN. § 280.22 (1996) ("[S]tudents of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications."); MASS. ANN. LAWS ch. 71, § 82 (Law. Co-op. 1991) ("The right of students to freedom of expression in the

and Washington, have free speech regulations in their administrative codes.<sup>79</sup> Since *Hazelwood* became law, however, dozens of states have considered legislation that would reject its holding.<sup>80</sup> Only a few states have passed such legislation into law.<sup>81</sup>

#### D. Censorship in Secondary Schools

As a result of the *Hazelwood* decision, secondary schools have censored student speech far more rampantly in the past decade than in previous years. According to the Student Press Law Center, a non-profit organization that provides legal support to public school and college media, the number of inquiries it receives each year has soared since the mid 1980s. In 1986, the Center reported hearing of 548 cases of censorship.<sup>82</sup> That statistic nearly tripled to 1588 in 1997.<sup>83</sup> In 1999, the number of inquiries to the Center reached 1624.<sup>84</sup> Of those inquiries, 367 came from high school journalists or their advisors, an increase of fourteen percent from 1998.<sup>85</sup> Mike Hiestand, an attorney for the Center, attributed the rise in part to the increasing

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public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school.").

<sup>79</sup> See 22 PA. CODE § 12.9(b) (1999) ("Students have the right to express themselves unless the expression materially and substantially interferes with the educational process, threatens immediate harm to the welfare of the school or community, encourages unlawful activity or interferes with another individual's rights."); WASH. ADMIN. CODE § 180-40-215(2) (2001) ("All students possess the constitutional right to freedom of speech and press . . .").

<sup>80</sup> In the first five years after the Supreme Court issued its *Hazelwood* decision, about two dozen states considered legislation addressing students' free speech rights. Hafen & Hafen, *supra* note 20, at 406 nn. 150, 151.

<sup>81</sup> States that have rejected legislation similar to the California law include Hawaii, Illinois, Indiana, Kentucky, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, Washington, and Wyoming. *Id.* Those states typically apply *Hazelwood*. See, e.g., *Pangle v. Bend-Lapine Sch. Dist.*, 10 P.3d 275 (Or. Ct. App. 2000) (applying *Hazelwood* to uphold a high school's expulsion of a student who wrote offensive articles for an unofficial student-produced newspaper).

<sup>82</sup> *High-School Journalism Censorship on Rise*, KANSAS CITY STAR, May 21, 1999, at E8.

<sup>83</sup> *Id.*

<sup>84</sup> *High School Censorship Calls Up Again in 1999*, in STUDENT PRESS LAW CENTER REPORT, Fall 2000, at 3 [hereinafter *1999 Censorship*], available at [http://www.splc.org/report\\_detail.asp?id=401&edition=4](http://www.splc.org/report_detail.asp?id=401&edition=4). That number soared even higher in 2000, to 2129. *High School Censorship Calls Soar in 2000*, in STUDENT PRESS LAW CENTER REPORT, Fall 2001, at 3 [hereinafter *2000 Censorship*], available at [http://www.splc.org/report\\_detail.asp?id=697&edition=19](http://www.splc.org/report_detail.asp?id=697&edition=19).

<sup>85</sup> *1999 Censorship*, *supra* note 84. The 367 inquiries in 1999 marked the fifth straight year with an increase in the number of inquiries from high school journalists and advisors. *Id.* The number rose dramatically to 518 in 2000. *2000 Censorship*, *supra* note 84.

tenacity of student journalists. "Students are now writing more hard-hitting stories, and administrations seem to be cracking down on them," Hiestand said. "They're not just writing about football games and proms anymore."<sup>86</sup>

One such instance arose in State College, Pennsylvania, in 1998, when a high school newspaper sought to publish a controversial story about students allegedly drinking at the school's homecoming dance.<sup>87</sup> The award-winning newspaper, the *Lions' Digest*, had a history of publishing probing journalism on such topics as birth control, drugs, and homosexuality.<sup>88</sup> Given that history, the staff was especially taken aback when the school administration ordered the newspaper not to publish its homecoming story.<sup>89</sup> The administration claimed protection of students' privacy; the newspaper cried censorship.<sup>90</sup> Whatever the reason, the story was killed.<sup>91</sup> "I guess I've learned that, when you look back at all of this, you can't cross the administration," said Mike Conti, Jr., then the newspaper's editor-in-chief. "They will always have the final say."<sup>92</sup> Most federal courts appear to agree.

## II. FIRST AMENDMENT RIGHTS ON COLLEGE CAMPUSES

The Supreme Court has not addressed the First Amendment protection attached to "school-sponsored" expression at the college level since its *Hazelwood* decision, and indeed, explicitly reserved that question in *Hazelwood*.<sup>93</sup> The Court, in a footnote near the end of its decision, stated: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."<sup>94</sup> Furthermore, in the years since *Hazelwood* no lower court had applied *Hazelwood* to a college publication until the courts in *Kincaid* did. Instead, the federal courts, including the Supreme Court, generally have recognized broader First Amendment rights at the college level, both before and after *Hazelwood*.

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<sup>86</sup> *High-School Journalism Censorship on Rise*, *supra* note 82.

<sup>87</sup> Vicki Cheng, *State College, Pa., High School Newspaper Story on Drinking Killed*, CENTRE DAILY TIMES (State College, Pa.), Nov. 19, 1998.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

<sup>94</sup> *Id.*



A. *Supreme Court Consideration of First Amendment Rights  
on College Campuses*

The starting point for an examination of college-level First Amendment jurisprudence is the 1972 case of *Healy v. James*, in which the Supreme Court considered a college president's rejection of a student application to form a local chapter of Students for a Democratic Society at Central Connecticut State College.<sup>95</sup> In rejecting the application, the president found that "the organization's philosophy was antithetical to the school's policies, and that the group's independence was doubtful."<sup>96</sup> In considering the dispute, the Supreme Court stated, "At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>97</sup> The Court then explicitly rejected the notion that First Amendment rights should be different on college campuses than they are in the community at large and thus held that the students' free association and free expression rights were violated.<sup>98</sup> The Court found the president's concern that the organization would cause disruptions on campus unpersuasive, citing a lack of evidence in support of the president's contention.<sup>99</sup>

One year later, the Supreme Court in *Papish v. Board of Curators of the University of Missouri* reaffirmed the broad First Amendment rights it set forth in *Healy*, holding that the University of Missouri could not expel a graduate student for distributing on campus a newspaper she produced with classmates.<sup>100</sup> The newspaper contained two pieces to which the university objected: a political cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice, and an article entitled "Motherfucker Acquitted."<sup>101</sup> Because of those pieces, the student who distributed the newspaper was expelled pursuant to a university policy prohibiting "indecent conduct or speech."<sup>102</sup> In holding that the university violated the student's First Amendment rights,

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<sup>95</sup> 408 U.S. 169, 194 (1972).

<sup>96</sup> *Id.* at 175 (citation omitted).

<sup>97</sup> *Id.* at 180.

<sup>98</sup> *See id.* at 187 ("The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights.").

<sup>99</sup> *Id.* at 188-91.

<sup>100</sup> 410 U.S. 667, 670-71 (1973).

<sup>101</sup> *Id.* at 667.

<sup>102</sup> *Id.* at 668.

the Court stated, "We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" <sup>103</sup> The Court further stated that the objectionable pieces were not legally obscene and that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." <sup>104</sup>

#### B. First Amendment Rights on College Campuses in the Lower Federal Courts

While the Supreme Court's consideration of First Amendment rights on college campuses following *Healy* and *Papish* has focused largely on other issues, including cases of religious rights and free association rights, the lower federal courts also have addressed the matter, most recently in *Kincaid v. Gibson*. <sup>105</sup> Prior to *Hazelwood*, the lower federal courts recognized First Amendment rights for college students to the same broad extent as the Supreme Court did in *Healy* and *Papish*. <sup>106</sup> For example, in *Stanley v. Magrath*, the Eighth Circuit held that the University of Minnesota could not restrict university funding pro-

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<sup>103</sup> *Id.* at 670. The Court in *Hazelwood* distinguished the newspaper at issue in *Papish* from the newspaper at issue in *Hazelwood* because the *Papish* newspaper was an off-campus "underground" publication. *Hazelwood*, 484 U.S. at 271 & n.3. Although the University of Missouri allowed the newspaper to be distributed on campus, that permission did not rise to the level of school-sponsored speech. *Id.*

<sup>104</sup> *Papish*, 410 U.S. at 670-71.

<sup>105</sup> 236 F.3d 342 (6th Cir. 2001). Supreme Court cases involving other First Amendment issues on college campuses include *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 232 (2000), holding that the University of Wisconsin's mandatory student activities fee did not violate the First Amendment free association rights of students who opposed funding of certain student groups; *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 845-46 (1995), holding that the University of Virginia's refusal to fund the printing of students' religious newspaper violated the students' free speech rights and was not excused by the Establishment Clause; and *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), holding that the University of Missouri's refusal to grant a student religious group access to university facilities generally open to other student groups was an unconstitutional content-based exclusion of religious speech.

<sup>106</sup> Pre-*Hazelwood* cases in the lower courts dealing with college students' First Amendment rights include *Sinn v. Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); and *Bazaar v. Fortune*, 476 F.2d 570, modified, 489 F.2d 255 (5th Cir. 1973). Similar cases decided before *Healy* and *Papish* include *Avins v. Rutgers State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971); *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967), vacated as moot sub nom. *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

vided to a student newspaper on the grounds that the newspaper published objectionable material.<sup>107</sup> Similarly, in *Schiff v. Williams*, the Fifth Circuit ruled that Florida Atlantic University could not dismiss three students from their positions as editors of a student newspaper because the university was dissatisfied with the quality of the newspaper.<sup>108</sup>

Following *Hazelwood*, however, the lower federal courts have not always been predictable in their application of the case, as most recently evidenced by the conflicting opinions in *Kincaid*.<sup>109</sup> In *Lueth v. St. Clair County Community College*, the Eastern District of Michigan declined to apply *Hazelwood* to a dispute in which the college's dean refused to allow the student newspaper to publish a particular advertisement.<sup>110</sup> The First Circuit put it more bluntly in *Student Government Ass'n v. Board of Trustees of the University of Massachusetts*, when it stated that *Hazelwood* "is not applicable to college newspapers."<sup>111</sup> By contrast, in *Bishop v. Aronov*, the Eleventh Circuit applied the *Hazelwood* public forum analysis to determine that the University of Alabama did not violate the First Amendment rights of a professor when it prohibited him from making religious statements in class.<sup>112</sup> Ultimately, in *Kincaid*, the Eastern District of Kentucky and the Sixth Circuit applied *Hazelwood*, for the first time, to college newspapers.

### C. Facts of *Kincaid v. Gibson*

Like many student free speech cases, *Kincaid* involved a strong butting of heads between administrators and students. At the time

<sup>107</sup> 719 F.2d 279, 280 (8th Cir. 1983).

<sup>108</sup> 519 F.2d 257, 259-61 (5th Cir. 1975).

<sup>109</sup> See *Hafen & Hafen*, *supra* note 20, at 406 ("The *Hazelwood* Court expressly stated that it was withholding judgment on whether its articulated standards would also apply in a university setting. Predictably, therefore, lower courts have not consistently applied *Hazelwood* in cases involving universities."). According to J. Marc Abrams & S. Mark Goodman:

Although *Kuhlmeier* dealt with a school-sponsored newspaper, it also casts uncertainty upon the status of independently run student newspapers and student newspapers at the college level. We will argue that the *Kuhlmeier* decision affects neither of these types of newspapers. The first amendment protections afforded these newspapers retain the vitality derived from the history of student press litigation in the past twenty years.

J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 707.

<sup>110</sup> 732 F. Supp. 1410, 1414-15 (E.D. Mich. 1990).

<sup>111</sup> 868 F.2d 473, 480 n.6 (1st Cir. 1989).

<sup>112</sup> 926 F.2d 1066, 1074-77 (11th Cir. 1991).

Kentucky State University administrators confiscated approximately 2000 copies<sup>113</sup> of the University's student yearbook, *The Thorobred*, Charles Kincaid and Capri Coffey, the plaintiffs in the case, were both students at the University.<sup>114</sup> Funding for both *The Thorobred* and *The Thorobred News*, the student newspaper, came at least partially from the University.<sup>115</sup> A mandatory eighty-dollar student activity fee automatically entitled each KSU student to a copy of the yearbook.<sup>116</sup> Both publications were subject to oversight by the University's Student Publications Board (the "Board"), a panel that included, among others, the student editors of the *The Thorobred* and *The Thorobred News*, the University's Vice President for Student Affairs, and the Student Publications Coordinator.<sup>117</sup> At the time of the confiscation, the Board did not have in effect a policy outlining the scope of the Board's oversight of student publications.<sup>118</sup> Instead, the University appeared to rely on a "Student Publications" section of the KSU student handbook.<sup>119</sup>

The 1992-94 edition of *The Thorobred* was under the direction of

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<sup>113</sup> Student Press Law Center, *supra* note 9.

<sup>114</sup> Kincaid v. Gibson, 191 F.3d 719, 722, *rev'd on reh'g*, 236 F.3d 342, 345 (6th Cir. 2001) (en banc).

<sup>115</sup> *Id.* The yearbooks were paid for with an estimated \$9000 in student activity fees. Student Press Law Center, *supra* note 9.

<sup>116</sup> Kincaid, 191 F.3d at 722. For further consideration on the constitutionality of mandatory student activity fees to fund university activities, see *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

<sup>117</sup> Kincaid, 191 F.3d at 722. The Board's functions included selecting the editors and staff for each student publication, arranging seminars for journalism education, providing the publications with counsel, and approving each publication's written publications policy. *Id.* The publications policies addressed such items as purpose, size, quantity controls, and the time, place, and manner of distribution. *Id.*

<sup>118</sup> *Id.* The Board subsequently adopted a "Student Publications Board Governing Policy," which Kincaid and Coffey cited in support of their claims. *Id.* at 722 n.1. However, because the policy was not in effect at the time of the confiscation, the court found that it carried no weight. *Id.*

<sup>119</sup> *Id.* at 722. Among other provisions, the "Student Publications" section stated: The Board of Regents respects the integrity of student publications and the press, and the rights to exist in an atmosphere of free and responsible discussion and of intellectual exploration. The Board expects student editors and faculty advisors to adhere to high standards of journalistic ethics and the highest level of good taste and maturity in the integrity, tone and content of student publications.

*Id.* The section continued, "Though both publications are subsidized by the University, it is the intent that both shall be as free of censorship as prevailing law dictates." *Id.* Finally, the section listed five responsibilities of the Board, outlined two standards of quality control that the University expected *The Thorobred News* to maintain, and concluded with various miscellaneous provisions. *Id.* at 722-23.

Coffer.<sup>120</sup> Although Coffer initially had supporting help from other yearbook staff members, those students soon dropped out, leaving Coffer with the sole responsibility of producing the publication.<sup>121</sup> Coffer selected the yearbook's theme, "Kentucky State: Destination Unknown," as well as its format, including the use of photographs depicting not only life at KSU but also current world events.<sup>122</sup> Coffer also selected purple for the yearbook's cover rather than gold and green, the University's official colors.<sup>123</sup> When the final copies of the yearbook arrived at KSU, the University's Vice President for Student Affairs, defendant Betty Gibson, expressed her displeasure with the product.<sup>124</sup> Gibson disliked the yearbook's purple cover, its theme and title, the inclusion of pictures unrelated to KSU, the dearth of school-related photos, and the absence of many photo captions.<sup>125</sup> After consulting with KSU President Mary Smith, Gibson decided not to distribute the yearbook and eventually planned to have them discarded.<sup>126</sup>

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<sup>120</sup> *Id.* at 723.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* Coffer selected the theme, "Kentucky State: Destination Unknown," because, in her words,

it was a commentary [on] just about everything that was happening at the University and within the lives of the students. . . . It was about . . . saying where are we going in our lives. . . . Destination Unknown, where am I going to be in five years from now[?] Where am I going to be ten years from now[?]

*Id.* (alterations in original).

<sup>123</sup> *Id.* Although KSU administrators preferred the use of the University's official colors for the yearbook, non-University colors had been used in the past. Coffer chose a non-University color, she said, because "we want[ed] to do something different. We wanted to bring Kentucky State University into the nineties. . . . I wanted to present a yearbook to the student population that was what they ha[d] never seen before." *Id.* (alterations in original).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* In addition to the alleged censorship of the yearbook, Kincaid and Coffer claimed that Gibson had sought to control the content of the student newspaper. *Id.* at 724. The students contended that certain comic strips were no longer published after Gibson criticized them for mocking the administration and aspects of life at KSU. *Id.* at 723-24. The students also alleged that in November 1994, Gibson directed the University's Publications Coordinator, Laura Cullen, to prohibit the newspaper from printing a particular letter to the editor and to convince the newspaper staff to publish more positive news. *Id.* at 724. When Cullen refused, claiming that such moves would violate the students' First Amendment rights, she was transferred to a position in the University's Housing Office. *Id.* After Cullen protested her transfer, she was reinstated to her position as Publications Coordinator. *Id.* Accompanying Cullen's reinstatement was a memorandum from Gibson requiring Cullen to ensure publication of more positive news, coverage of all campus events, review of the newspaper by the Board, the meeting of all deadlines, and the monitoring of content for the yearbook. *Id.*

KSU's regulation of *The Thorobred* and *The Thorobred News* prompted Kincaid and Coffey to file a lawsuit in November 1995 in the United States District Court for the Eastern District of Kentucky.<sup>127</sup> Among other claims, the students alleged that Gibson's interference with the newspaper and the University's refusal to distribute the yearbook violated their First Amendment free speech, free expression, and free association rights.<sup>128</sup> Kincaid and Coffey sought both damages and injunctive relief, including a court order requiring KSU to distribute the 1992-94 yearbooks and to refrain from further regulation of student publications.<sup>129</sup>

Having previously dismissed the plaintiffs' other claims, the district court's November 14, 1997, decision considered only the students' First Amendment free speech claims as to the yearbook and newspaper, the breach of contract claim, and the arbitrary and capricious governmental action claim, ruling against the students on each

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<sup>127</sup> See *id.* (recounting the unreported prior history of the case); see also Kincaid, No. 95-98 (W.D. Ky. Nov. 14, 1997) (containing the unofficial text of the district court opinion), [http://www.splc.org/law\\_library.asp?id=17](http://www.splc.org/law_library.asp?id=17). Kincaid and Coffey filed suit individually and on behalf of a proposed class of KSU students. Kincaid, 191 F.3d at 724. The suit named as defendants Betty Gibson, Mary Smith, and the eleven members of KSU's Board of Regents. *Id.*

A separate lawsuit already had resulted from the University's control over the student publications. In March 1995, Cullen filed suit in the United States District Court for the Eastern District of Kentucky against KSU and KSU officials, claiming that the University violated the students' First Amendment rights and transferred her from her position as Coordinator of Student Publications in retaliation. See Cullen v. Gibson, No. 96-6116, 1997 U.S. App. LEXIS 33186, at \*2-3 (6th Cir. Sept. 4, 1997) (*per curiam*) (unpublished table decision) (stating the procedural history of the case, including the unreported actions of the court below). Cullen sought damages and a court order requiring the University to distribute the confiscated yearbooks and to refrain from controlling the student publications. *Id.* at \*5-6. After the court ruled against Cullen, holding in part that she lacked standing because the alleged First Amendment violations injured the students and not her, she appealed to the United States Court of Appeals for the Sixth Circuit. *Id.* at \*3. Affirming the district court, the Sixth Circuit held that Cullen's case was moot because she had resigned from KSU after filing the lawsuit. *Id.* at \*7-8. The United States Supreme Court subsequently denied Cullen's petition for certiorari. 522 U.S. 1117 (1998).

<sup>128</sup> Kincaid, 191 F.3d at 724. The students further claimed that the yearbook confiscation deprived students of their property rights in violation of the Fourteenth Amendment, the confiscation breached a contractual duty to provide students with a yearbook in return for the eighty-dollar mandatory student activity fee, and the University's actions constituted an arbitrary exercise of governmental power in violation of the Kentucky Constitution. *Id.*

<sup>129</sup> *Id.* Kincaid and Coffey also sought class certification for all former and present KSU students who were either consumers of or contributors to *The Thorobred* and *The Thorobred News*. *Id.* at 724-25. The district court denied the request. *Id.* at 725.

count.<sup>130</sup> An appeal to the Sixth Circuit Court of Appeals followed, and, on September 8, 1999, the Sixth Circuit, in a 2-1 decision, affirmed the district court on each count.<sup>131</sup> However, on November 29, 1999, the full Sixth Circuit voted for rehearing of the case en banc and vacated its September 8th decision.<sup>132</sup> The full court reversed the district court decision on January 5, 2001,<sup>133</sup> and the University and the students ultimately reached a settlement on the matter in February 2001.<sup>134</sup>

#### D. Kincaid v. Gibson: *District Court Opinion*

The district court, in its November 14, 1997, ruling, considered the students' First Amendment free speech claims as to the yearbook and newspaper, the breach of contract claim, and the arbitrary and capricious governmental action claim.<sup>135</sup> The portion of the court's opinion relying on *Hazelwood* centered on the students' First Amendment free speech claim as to the yearbook. The court began its analysis by stating, "[t]he First Amendment certifies that the state shall not abridge a citizen's right to free speech. The Supreme Court, however, has allowed speech to be regulated in some circumstances."<sup>136</sup> The extent to which speech may be regulated, the court noted, depends on the nature of the forum of the speech:

If the forum is either a public forum or a limited public forum, then the state can only regulate the content of the speech when it puts forth a narrow and compelling reason to do so. If the forum is not a public forum, however, the state need only show that the "regulation on speech is reasonable . . . ."<sup>137</sup>

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<sup>130</sup> *Id.* By memorandum opinion entered on June 26, 1996, the district court, citing Eleventh Amendment immunity, already had dismissed each of the students' claims for monetary damages against the defendants in their official capacities. *Id.* The court also had dismissed the students' Fourteenth Amendment due process claim, stating that neither the students' expectations of receiving a yearbook nor their alleged contract for goods rose to the level of a vested property right. *Id.* Finally, the court dismissed the students' First Amendment free association claim. *Id.*

<sup>131</sup> *Id.* at 730.

<sup>132</sup> 197 F.3d 828 (6th Cir. 1999).

<sup>133</sup> 236 F.3d 342 (6th Cir. 2001).

<sup>134</sup> Student Press Law Center, *News Flash: KSU Agrees to Release Yearbooks Confiscated by School Officials in 1994 in Settlement with Students*, at [http://www.splc.org/newsflash\\_archives.asp?id=238&year=2001](http://www.splc.org/newsflash_archives.asp?id=238&year=2001) (Mar. 1, 2001).

<sup>135</sup> *Kincaid*, No. 95-98 (W.D. Ky. Nov. 14, 1997), [http://www.splc.org/law\\_library.asp?id=17](http://www.splc.org/law_library.asp?id=17).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (citing and quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460

The central determination was thus whether the yearbook was a public forum, a limited public forum, or a nonpublic forum, a determination the court conceded was "not clear."<sup>138</sup>

The court noted that the few courts that have considered whether a yearbook is a public forum have not universally agreed. For the proposition that any university publication is a public forum, the court acknowledged the reasoning set forth in *Bazaar v. Fortune*.<sup>139</sup> The Fifth Circuit in *Bazaar* recognized the principle accepted by many courts that a university publication should be considered an "open forum" and as such can only be censored when the publication "would or could lead to any significant disruption on the University campus."<sup>140</sup> Using this reasoning, the *Bazaar* court held that a university's censorship of a student literary magazine violated the First Amendment.<sup>141</sup>

To contrast with the *Bazaar* line of cases, the district court in *Kincaid* addressed *Hazelwood* and its progeny. The court noted that the Supreme Court in *Hazelwood* stated that the crucial element in determining whether a school publication is a public forum is the publisher's intent to open that forum to the public.<sup>142</sup> Because the *Hazelwood* court found that the school had not intended to open its student newspaper to the public, the newspaper was not deemed a public forum.<sup>143</sup> Following that reasoning, the district court noted,<sup>144</sup> the First Circuit in *Yeo v. Town of Lexington* held that advertising pages in a high school student newspaper and yearbook were a limited public forum because advertising space could be purchased by outside users.<sup>145</sup> The dissent in *Yeo*, however, reached the opposite conclusion, stating that neither the yearbook advertising section nor the yearbook as a whole could be considered a public forum.<sup>146</sup> In addition, the dissent rea-

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U.S. 37, 45-46 (1983)).

<sup>138</sup> *Id.*

<sup>139</sup> 476 F.2d 570, 580-81 (5th Cir. 1973) (ordering a public university on First Amendment free speech grounds to refrain from interfering with the publication and distribution of a student magazine).

<sup>140</sup> *Id.* at 575-76.

<sup>141</sup> *Id.* at 580.

<sup>142</sup> *Kincaid*, No. 95-98 (W.D. Ky. Nov. 14, 1997), [http://www.splc.org/law\\_library.asp?id=17](http://www.splc.org/law_library.asp?id=17).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> No. 96-1623, 1997 WL 292173 (1st Cir. June 6, 1997) (unpublished table decision), *opinion withdrawn and reh'g granted*, 131 F.3d 241 (1st Cir. 1997) (en banc). The court in *Yeo* limited its public forum analysis to the advertising pages in the publications, not to the publications in their entirety. *Yeo*, 1997 WL 292173, at \*23.

<sup>146</sup> *Yeo*, 1997 WL 292173, at \*27 (Lynch, J., dissenting).



soned that the newspaper also could not be deemed a public forum: "High school yearbooks are not usually vehicles for the expression of views, or for robust debate about societal issues, and they never have been."<sup>147</sup>

Finally, the district court in *Kincaid*<sup>148</sup> cited the Ninth Circuit's decision in *Planned Parenthood v. Clark County School District*.<sup>149</sup> In *Planned Parenthood*, the court held that the advertising pages of a public school yearbook, newspaper, and athletic programs were not public forums and thus could be regulated by the school.<sup>150</sup> The court stated:

Under *Hazelwood*, in cases such as this where school facilities have not intentionally been opened to indiscriminate expressive use by the public or some segment of the public, school officials retain the authority reasonably to refuse to lend the schools' name and resources to speech disseminated under school auspices.<sup>151</sup>

Faced with this conflicting legal authority, the district court in *Kincaid* found the analysis set forth in *Planned Parenthood* and in the *Yeo* dissent more persuasive, particularly when considered in light of *Hazelwood*.<sup>152</sup> The court thus found that KSU did not intend to open *The Thorobred* to the public and as a result could exercise reasonable control over the yearbook.<sup>153</sup> Without acknowledging any potential differences between a student publication at the high school and college levels, the court stated, "the yearbook was not intended to be a journal of expression and communication in a public forum sense, but instead was intended to be a journal of the 'goings on' . . . at KSU."<sup>154</sup> As a result, the court held that the University's refusal to distribute the yearbooks was reasonable. The court noted:

It was reasonable for the administration to want the annual to explain who the students were in the pictures—so that fifteen years from now, the students could look back and remember, for example, who the KSU

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<sup>147</sup> *Id.* at \*27-29 (Lynch, J., dissenting).

<sup>148</sup> No. 95-98 (W.D. Ky. Nov. 14, 1997), [http://www.splc.org/law\\_library.asp?id=17](http://www.splc.org/law_library.asp?id=17).

<sup>149</sup> 941 F.2d 817 (9th Cir. 1991).

<sup>150</sup> *Id.* at 830.

<sup>151</sup> *Id.* at 828.

<sup>152</sup> *Kincaid*, No. 95-98 (W.D. Ky. Nov. 14, 1997), [http://www.splc.org/law\\_library.asp?id=17](http://www.splc.org/law_library.asp?id=17).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

homecoming queen was. Moreover, it was reasonable for the administration to want the yearbook to focus mainly on KSU.<sup>155</sup>

Such factors, the court thus concluded, sufficed to warrant the University's control over *The Thorobred*.<sup>156</sup>

#### E. Kincaid v. Gibson: *Vacated Sixth Circuit Opinion*

Affirming the district court in a 2-1 decision, the Sixth Circuit panel, like the district court, began its analysis by addressing the conflict in the federal courts over whether the content of school publications is subject to regulation.<sup>157</sup> The panel noted, for example, that the federal courts widely held in the 1970s and early 1980s that the First Amendment protected college publications.<sup>158</sup> However, the

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<sup>155</sup> *Id.* Despite ruling against the students, the court concluded its opinion by stating: "In the end, the parties have caused a lot of strife over a yearbook, and have not only hurt themselves, but have, more importantly, hurt the student body and KSU, by not allowing a yearbook to be published for the 1992-1994 years." *Id.*

<sup>156</sup> *Id.* The court ruled against the students on their remaining claims as well. Addressing the students' First Amendment claim as to the newspaper, the court held that the students lacked standing to bring suit because they suffered no injury. *Id.* The students' contentions that they were harmed by Gibson's criticisms of certain comic strips, that the comic strips were not published as a result of the criticism, and that Cullen was transferred to a new position for refusing to follow Gibson's orders did not rise to the level of injury required for standing. *Id.* Addressing the students' breach of contract claim, the court held that damages cannot be had against KSU or the individual defendants in their official capacities because they are entitled to sovereign immunity under the Eleventh Amendment. *Id.* Furthermore, the defendants could not be held individually liable because they did not individually contract with the students. *Id.* Finally, addressing the students' arbitrary and capricious governmental action claim, the court held that since the University had the right to exercise reasonable control over *The Thorobred*, its action could not be considered arbitrary and capricious. *Id.*

<sup>157</sup> Kincaid v. Gibson, 191 F.3d 719, 726 (6th Cir. 1999).

<sup>158</sup> *Id.* For the proposition that the First Amendment protects college publications, the court cited *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), holding that a university violated students' First Amendment rights when it cut the student newspaper's funding, in part, because it objected to the newspaper's content; *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), finding that a university encroached on students' free speech rights when it dismissed student newspaper editors because of disapproval of the newspaper's content; *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), ruling that a university's withdrawal of funding from a student newspaper violated First Amendment rights; *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), finding a violation of students' free speech rights when a university censored a student literary publication; *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970), holding that a university's removal of offensive content from a student publication violated students' First Amendment rights; and *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970), finding a free speech infringement when a university required prior review of all content in a student newspaper.

court then turned its attention to *Hazelwood*, stating, "The framework established in *Hazelwood* applies to plaintiffs' claims in the instant action."<sup>159</sup> Despite acknowledging several factors that distinguished *Hazelwood*, the court found the *Hazelwood* analysis governing and held that Kincaid and Coffey provided insufficient evidence to prove that KSU intended *The Thorobred* to serve as a public forum.<sup>160</sup> For example, although the University's student handbook provided that "it is the intent that both [*The Thorobred* and *The Thorobred News*] shall be as free of censorship as prevailing law dictates," the court found that the "language certainly contains nothing to suggest an intent by the university to expand the protection afforded student speech in a nonpublic forum to that of a public forum."<sup>161</sup>

Moreover, the panel found other evidence expressly indicating that the University did not intend to open *The Thorobred* to the public. For example, the University's student handbook emphasized that both *The Thorobred* and *The Thorobred News* "shall be under the management of the Student Publications Board" and that the Board had the authority to carry out specific responsibilities, such as approval of the publications' written policies.<sup>162</sup> Thus, the court stated, "although the university evinced an intention that students be allowed to determine the content of expression, it left ultimate control over the form and manner of that expression in the hands of the Publications Board."<sup>163</sup>

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<sup>159</sup> *Kincaid*, 191 F.3d at 726. The court rejected the students' claim that *Hazelwood* did not apply because the yearbook was under the control of private individuals, that is, the students. *Id.* at 726 n.2.

<sup>160</sup> *Id.* at 727-28. Among the distinctions the court cited were the fact that *The Thorobred* was not produced as part of a classroom activity, unlike the newspaper in *Hazelwood*, and the fact that KSU officials did not regularly intervene in the day-to-day operations of the yearbook, unlike the involvement of school officials in *Hazelwood*. *Id.* at 727. The court, however, ignored the distinction that *The Thorobred* was a college publication and the newspaper in *Hazelwood* was a high school publication.

<sup>161</sup> *Id.* at 728. The court also found unconvincing the fact that the University had not yet adopted an official policy regarding the scope of *The Thorobred's* intended purpose. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* The panel also contrasted the University's statement in its student handbook that it did not consider *The Thorobred News* to be "an 'official' organ of the University" with the absence of any such statement for the yearbook. *Id.* Noting that the University only required *The Thorobred News* to include a disclaimer "indicating that the views expressed are not necessarily those of the University, but rather are those of the named student author, editor or board of editors," the court stated that "[t]he exclusion of the yearbook from this requirement evidences KSU's intent that the yearbook bear the imprimatur of KSU and serve, as defendant Gibson testified, as a KSU-sponsored representation of student life at the university rather than as an open forum for student expression." *Id.*

Given such factors, the court concluded that "KSU intended *The Thorobred* to remain a nonpublic forum."<sup>164</sup>

Having so concluded, the court proceeded to consider whether the University's confiscation of the yearbooks was reasonable. In a brief analysis of the record, the court found the University's action justifiable. The court emphasized:

It is no doubt reasonable that KSU should seek to maintain its image to potential students, alumni, and the general public. In light of the undisputedly poor quality of the yearbook, it is also reasonable that KSU might cut its losses by refusing to distribute a university publication that might tarnish, rather than enhance, that image.<sup>165</sup>

The court also acknowledged Kincaid and Coffey's claim that it may have been more reasonable for the Student Publications Board to have monitored the yearbook before its completion.<sup>166</sup> But, the court stated, "regulation of speech in a nonpublic forum 'need only be reasonable; it need not be the most reasonable or the only reasonable limitation.'"<sup>167</sup>

In a separate opinion concurring in part and dissenting in part, Judge Cole argued that the court should have reached the opposite conclusion regarding *The Thorobred*.<sup>168</sup> Asserting that the yearbook should have been considered a public forum, Judge Cole criticized the majority for relying on *Hazelwood*, when that case addressed a high school publication.<sup>169</sup> Judge Cole stated:

The majority fails to acknowledge this point, instead applying the same level of deference to KSU as the Court did to *Hazelwood East High School*. Neither this court nor any of our sister circuits have taken a position on this issue, and I hesitate to do so implicitly, as the majority has done.<sup>170</sup>

Even applying *Hazelwood*, Judge Cole would have found the yearbook

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 729.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (quoting *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 683 (1992)). The court ruled against Kincaid and Coffey on their other claims as well. *Id.* at 729-30. On the students' First Amendment claim as to *The Thorobred News*, the court affirmed the district court's finding that the students lacked standing. *Id.* The court also affirmed the district court's findings against the students on their breach of contract claims and on their arbitrary and capricious governmental action claim. *Id.* at 730.

<sup>168</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>169</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>170</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

to be a limited public forum, not a nonpublic forum.<sup>171</sup>

In so finding, Judge Cole referred to a portion of the student handbook allowing the student publications advisor to require changes in materials in the publications, but those changes "must deal only with the form or the time and manner of expression rather than alteration of its content."<sup>172</sup> Such language, Judge Cole reasoned, equated with language in *Perry Education Ass'n v. Perry Local Educators' Ass'n*<sup>173</sup> defining the First Amendment protection afforded a limited public forum: "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."<sup>174</sup> Treating *The Thorobred* as a limited public forum, Judge Cole found that KSU's actions were unconstitutional content-based restrictions that did not serve a compelling governmental interest.<sup>175</sup>

#### F. Kincaid v. Gibson: Sixth Circuit En Banc Decision

By a 10-3 vote, the full Sixth Circuit reversed the panel decision that extended the *Hazelwood* standard to college publications.<sup>176</sup> The court concluded instead that *The Thorobred* was a limited public forum, thus rejecting KSU's contention that *The Thorobred* was a nonpublic forum.<sup>177</sup> The court relied on several factors in concluding that *The Thorobred* was a limited public forum, that is, that KSU intended to open the yearbook to the public. These factors included KSU's policy and practice, the nature of *The Thorobred* and its compatibility with expressive activity, and the context in which the yearbook was founded.<sup>178</sup> Applying these factors, the court found "clear evidence of KSU's intent to make the yearbook a limited public forum."<sup>179</sup>

Addressing KSU's policy, as written in the "Student Publications" section of the KSU student handbook, the court noted foremost that

<sup>171</sup> *Id.* at 731 (Cole, J., concurring in part and dissenting in part).

<sup>172</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>173</sup> 460 U.S. 37 (1983).

<sup>174</sup> *Kincaid*, 191 F.3d at 731 (Cole, J., concurring in part and dissenting in part) (quoting *Perry*, 460 U.S. at 46).

<sup>175</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>176</sup> See *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.").

<sup>177</sup> *Id.* at 348-49. For more detailed discussions of the public forum doctrine, see *supra* note 49 and *infra* Part III.C.

<sup>178</sup> *Kincaid*, 236 F.3d at 352.

<sup>179</sup> *Id.* at 349.

the policy put editorial control of the yearbook in the hands of student editors.<sup>180</sup> The court stated of this policy:

This is made clear by the policy's description of the Student Publications Advisor, a university employee. The policy directs that the [Board] "shall require the use of an experienced advisor," but limits the advisor's role to "assuring that the . . . yearbook is not overwhelmed by ineptitude and inexperience." Indeed, the policy expressly limits the types of changes that the advisor may make to the yearbook . . . .<sup>181</sup>

Turning to the possibility of KSU potentially intending to create a limited public forum, the court found "substantial evidence" that the University "followed its stated 'hands off' policy in actual practice."<sup>182</sup> For example, prior to publication, the administration never expressed concern about the yearbook's content, nor did any official exercise oversight of the content.<sup>183</sup> As a result, the court stated: "[T]he record before us is clear that, in actual practice, student editors—not KSU officials, not the student publications advisor, and not the [Board]—determined the content of KSU's student yearbook."<sup>184</sup>

The nature of *The Thorobred* and its compatibility with expressive activity, and the context in which the yearbook was found, also convinced the court that the yearbook was a limited public forum.<sup>185</sup> The court emphasized, for example, that the yearbook, "by its very nature, exists for the purpose of expressive activity."<sup>186</sup> The court also distinguished the yearbook from the newspaper at issue in *Hazelwood*, noting that *The Thorobred* was not a classroom activity for which students received grades.<sup>187</sup> Indeed, the court stated that the context in which the case arose, a university setting, gave greater support to the finding of a limited public forum.<sup>188</sup> Citing several Supreme Court cases that highlighted the importance of open and robust speech on college campuses, the court stated: "The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection."<sup>189</sup> The court also once again dis-

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 349-50.

<sup>182</sup> *Id.* at 351.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 351-52.

<sup>186</sup> *Id.* at 351.

<sup>187</sup> *Id.* at 352.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

tinguished *Hazelwood*:

In addition to the nature of the university setting, we find it relevant that the editors of *The Thorobred* and its readers are likely to be young adults—Kincaid himself was thirty-seven at the time of his March 1997 deposition. Thus, there can be no justification for suppressing the yearbook on the grounds that it might be "unsuitable for immature audiences."<sup>190</sup>

The court thus concluded that the yearbook was a limited public forum and turned its attention to determining whether KSU's conduct was constitutional in light of that conclusion.

As previously discussed, in a limited public forum, the government may only impose reasonable time, place, and manner restrictions, and content-based restrictions that are narrowly drawn to serve a compelling state interest.<sup>191</sup> The court found that KSU's conduct violated this principle.<sup>192</sup> Concluding that the University's action was far from narrowly drawn, the court stated that "wholesale confiscation of printed materials which the state feels reflect poorly on its institutions is as broadly sweeping a regulation as the state might muster."<sup>193</sup> The court also noted that the confiscation left open no alternative means of similar communication.<sup>194</sup> Moreover, the court emphasized that the University's actions would have failed to pass constitutional muster even under the more lenient nonpublic forum standard:

Even were we to assume, as the KSU officials argue, that the yearbook was a nonpublic forum, confiscation of the yearbook would still violate Kincaid's and Coffey's free speech rights. Although the government may act to preserve a nonpublic forum for its intended purposes, its regulation of speech must nonetheless be reasonable, and it must not attempt to suppress expression based on the speaker's viewpoint. The actions taken by the KSU officials fail under even this relaxed standard.<sup>195</sup>

The court thus concluded that the First Amendment rights of Kincaid and Coffey were violated and remanded the case for determination of the proper relief.<sup>196</sup>

Following the court's ruling, the University reached a settlement

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<sup>190</sup> *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

<sup>191</sup> *Id.* at 354 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 355 (citations omitted).

<sup>196</sup> *Id.* at 357.

with Kincaid and Coffey.<sup>197</sup> In exchange for the students' agreement to settle the case before a court determination of relief, the University provided \$5,000 each to Kincaid and Coffey, plus \$60,000 in attorney's fees and costs. In addition, the University agreed to release the confiscated yearbooks.<sup>198</sup>

*G. Reaction to KSU's Actions, the Court Rulings, and  
Censorship on College Campuses*

Reaction to the actions of the KSU administration and to the federal courts' decisions in *Kincaid* has been extensive. Not surprisingly, given the effect the ruling could have on college media, newspapers on campuses nationwide have written extensively on the topic. Following the district court's decision, the University of Kentucky's student newspaper, the *Kentucky Kernel*, quoted Carlos Dawson, then the editor of Kentucky's yearbook: "It is a shame this has happened because part of journalism is creativity."<sup>199</sup> Libby Fraas, a journalism professor at Eastern Kentucky University and faculty advisor to its student newspaper, had harsher criticism: "How they can call themselves an 'educational institution' is beyond me if they exercise such disdain for the First Amendment rights of their students."<sup>200</sup> Reaction to the district court's ruling was picked up in the popular press as well. The *Lexington Herald-Leader*, for example, quoted individuals on both sides of the dispute, contrasting a college journalism advisor's fear over excessive administrative censorship with the concern of universities that campus publications meet certain standards.<sup>201</sup>

Following the Sixth Circuit's since-vacated September 8, 1999, decision, the reaction continued. Once again, both college publications and the popular media reported on the decision.<sup>202</sup> Media coverage of

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<sup>197</sup> See Student Press Law Center, *supra* note 134.

<sup>198</sup> See *id.* (noting that "the University agreed to distribute the 717 remaining copies of the 1994 *Thorobred* yearbook . . . to the students who were supposed to receive them in 1994").

<sup>199</sup> Molly Mize & Mat Herron, *Ruling Worries Student Media*, KENTUCKY KERNEL, Dec. 4, 1997, available at <http://www.kernel.uky.edu/1997/fall/12/04/news14.shtml>.

<sup>200</sup> *Id.*

<sup>201</sup> See John Cheves, *Kentucky State Students Demand Belated Release of Confiscated Yearbook*, LEXINGTON HERALD-LEADER, Aug. 2, 1998 (reporting on the KSU legal dispute and on the opinions of individuals on both sides of the dispute); see also Jeffrey Selingo, *Federal Court Ruling Worries Student Journalists*, CHRON. HIGHER EDUC., Dec. 12, 1997, at A40 (discussing the district court's ruling and both the university's and students' reactions to it).

<sup>202</sup> See, e.g., *College Publications Should Remain Free*, CRIMSON WHITE, republished via



the dispute continues to this day. The Society of Professional Journalists, for example, reported in its publication, *The Quill*, that it had given a \$4000 grant to the lawyers representing Kincaid and Coffey.<sup>203</sup> "This case could potentially cast a long shadow," the society's president, Kyle Elyse Niederpruem, told *The Quill*. "This takes standards set for high school journalists, allowing broad and unrestricted authority for administrators to censor materials."<sup>204</sup>

Causing further concern for free speech advocates is the increase in censorship on college campuses in recent years. Indeed, "[c]ensorship of public university student newspapers is alive and well in the United States."<sup>205</sup> Interestingly, universities far less frequently censor the liberal student ideas that were so often censored in earlier decades. Instead, "the trend today is one of wary liberal administrations attempting to censor conservative viewpoints,"<sup>206</sup> such as racist or racially sensitive material.

Censorship on campus currently takes shape in at least two other prominent ways. First, universities attempt to regulate speech that is critical of some aspect of the university. Second, universities increasingly seek to control the choice of advertisements in student publications.<sup>207</sup> In order to achieve these goals, universities rely on a variety of actions, the most prevalent of which are prior restraint by a university censorship board, personal attacks against a student editor, and attacks against the funding of a publication.<sup>208</sup> Universities also give several justifications for censorship, especially of student publications. Such reasons include preventing disruption of the campus, protecting students from offensive speech, and ensuring that student expression

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U-WIRE, Sept. 9, 1999 (criticizing the Sixth Circuit decision as "dangerous to student publications at public universities across the country"), available at LEXIS; Ben L. Kaufman, *KSU Yearbook Seizure Upheld: Free-Speech Arguments Rejected*, CINCINNATI ENQUIRER, Sept. 9, 1999, at B1 (reporting on the majority opinion, the dissent, and reaction to the Sixth Circuit's ruling); Rachel Malone, *Federal Courts Didn't Serve Justice to Student Journalists*, DAILY MISSISSIPPIAN, republished via U-WIRE, Sept. 9, 1999 ("In an environment where students are trying to become professionals, there is nothing professional about censorship. Our job as journalists is to be watchdogs of society, not smiling faces or talking heads for university officials."), available at LEXIS.

<sup>203</sup> *SPJ Awards \$4,000 to Help with Students' Case*, THE QUILL, July 2000, at 75.

<sup>204</sup> *Id.*

<sup>205</sup> Greg C. Tenhoff, Note, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511, 511 (1991).

<sup>206</sup> *Id.* at 512.

<sup>207</sup> See *id.* (describing the movement toward banning alcohol advertisements in student publications).

<sup>208</sup> See *id.* at 515-17 (discussing methods used by universities to restrain student journalists).

is not attributed to the university.<sup>209</sup> In response to such acts of censorship and other college media concerns, the Student Press Law Center in 1999 received 748 inquiries regarding college censorship, down slightly from 791 in 1998.<sup>210</sup>

### III. INAPPLICABILITY OF *HAZELWOOD* TO COLLEGE CAMPUSES

With the historical backdrop of First Amendment jurisprudence in mind, the *Hazelwood* free-speech standard, as a matter of law and policy, should not be applied to student speech on college campuses. The Court held in *Hazelwood* that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>211</sup> For several reasons, such a standard is inappropriate when applied to speech at the college level.

#### A. *Differing Judicial Treatment of Primary and Secondary Education as Opposed to College Education*

Applying *Hazelwood* to student expression on college campuses would fly in the face of the Supreme Court's long recognized precedent that diverse expression is vital to higher education. Indeed, the distinction between the Court's recognition of college free expression and primary and secondary school free expression could not be more stark.

#### 1. Role of Free Expression in College Education

Unlike primary and secondary schools, the Court has long held, college campuses are unquestionably a "marketplace of ideas."<sup>212</sup> Exposure to many viewpoints indeed historically has been a defining characteristic of higher education. With this mindset, the Supreme Court has held, for example, that a university cannot fire employees

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<sup>209</sup> See *id.* at 528-38 (highlighting the many rationales offered by universities to justify censorship of student publications).

<sup>210</sup> 1999 Censorship, *supra* note 84.

<sup>211</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>212</sup> *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (emphasizing that an atmosphere of "speculation, experiment and creation" is "essential to the quality of higher education" (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))).

pursuant to a state law for belonging to the Communist Party.<sup>213</sup> To do so, the Court has stated, would contravene the notion that the "[n]ation's future depends upon leaders trained through wide exposure to that robust exchange of ideas."<sup>214</sup>

The Court focused on similar principles in *Healy v. James*.<sup>215</sup> In ruling that a college could not prohibit the formation of a student organization because it opposed the organization's viewpoint, the Court emphasized that the First Amendment applies equally to college campuses as it does to the society as a whole:

[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.<sup>216</sup>

The Court has adhered to this view throughout its consideration of cases touching on the value of diverse expression on college campuses. Indeed, two of the most significant recent Supreme Court decisions addressing issues on college campuses have relied in part on the role free speech plays in higher education. In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court took a historical approach to First Amendment jurisprudence on college campuses in holding that a university could not refuse to fund the printing of a religious newspaper produced by students.<sup>217</sup> The Court emphasized that universities began in ancient Athens and later in Europe as "voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn."<sup>218</sup> Noting that the intellectual curiosity of students remains today a central determination of a university's success, the Court asserted that restriction of that curiosity "risks the

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<sup>213</sup> *Keyishian*, 385 U.S. at 609-10.

<sup>214</sup> *Id.* at 603.

<sup>215</sup> 408 U.S. 169 (1972).

<sup>216</sup> *Id.* at 180-81 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), and *Keyishian*, 385 U.S. at 603); see also *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 671 (1973) ("[T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . .").

<sup>217</sup> 515 U.S. 819, 837 (1995).

<sup>218</sup> *Id.* at 836 (citing R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 39 (7th ed. 1992)).

suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."<sup>219</sup>

Such a concern was also at play in the Supreme Court's most recent consideration of First Amendment rights on college campuses. In *Board of Regents of the University of Wisconsin System v. Southworth*,<sup>220</sup> the Court considered the constitutionality of the university's mandatory student activity fee that was used to fund various student groups. In upholding the fee system against a First Amendment challenge from students who opposed the funding of organizations whose viewpoints they opposed, the Court briefly stated that "recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."<sup>221</sup> In recognizing that principle, the Court agreed with the argument put forth by the University of Wisconsin that an essential function of its educational mission is exposure to a diversity of expressions and ideas.<sup>222</sup> Thus, to this day, the Supreme Court has recognized the value of free speech on college campuses, a value that was perhaps first and most forcefully put forth in the 1957 case of *Sweezy v. New Hampshire*:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>223</sup>

## 2. Role of Free Expression in Primary and Secondary Education

While the "essentiality of freedom in the community of American universities" may have a long history, similar freedom in primary and secondary schools has been in much dispute since the nation's founding. Given the historical dispute, both modern scholars and federal courts have struggled over what role free speech should play in educa-

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<sup>219</sup> *Id.*

<sup>220</sup> 529 U.S. 217 (2000).

<sup>221</sup> *Id.* at 231.

<sup>222</sup> See Brief for Petitioners at 21, *Southworth* (No. 98-1189) ("The Board of Regents has also determined that it is essential to provide certain services to a diverse student population, which at times also involve the expression of diverse viewpoints.").

<sup>223</sup> 354 U.S. 234, 250 (1957).

tion. However, in recent decades, the vast majority of courts have recognized only a limited role for free speech in primary and secondary schools, in sharp contrast to the broader free speech rights granted to college students.

In the early days of the nation, Americans held two competing visions of social order, visions that have ever since impacted the educational missions of the nation's primary and secondary schools.<sup>224</sup> Under one vision, embraced by the federalists in the nation's early years and derived from liberal Enlightenment thought, emphasis was placed on individualism. According to this vision, "the purpose of the community was simply to give individuals the needed security (i.e., freedom) to pursue their private interests."<sup>225</sup> The alternative vision minimized the emphasis on individuality and instead focused on the social nature and interaction of individuals. This vision of "civic republicanism," dating back to ancient Greece and the Italian city-states, was based on the assumption "that people were shaped by the institutions in which they functioned" and that it was "the responsibility of these institutions to promote 'civic virtue.'"<sup>226</sup> The tension between this vision of civic republicanism and the vision of individualism permeated all facets of the nation's early life and in many ways continues to do so today. Perhaps no clearer example of this tension exists than in the public school classroom:

The dilemma of public education is thus manifest. Because few institutions affect young, impressionable personalities as profoundly as do our schools, we as a community are justifiably concerned that our educational program should promote the "right" skills and values for the development of an individual capable of contributing in a meaningful way to our community. Yet by authorizing schools to develop this "right" environment, we leave our children highly vulnerable to "village tyrants" who might pervert the education process. Under the guise of properly educating the young, government could predispose children to accept and defer to authority while passively adopting prevailing values and current attitudes. The school system, consequently, epitomizes the tension between liberty and authority.<sup>227</sup>

Thus, on the one hand, primary and secondary schools may be viewed as institutions responsible for instilling values in the nation's young children, children who need the shaping and guidance pro-

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<sup>224</sup> Ingber, *supra* note 20, at 430.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 431.

<sup>227</sup> *Id.* at 425 (footnotes omitted).

vided by those with greater experience. This perception considers schools, and the educational lessons those schools choose to provide, as the primary means by which students are prepared to be the nation's future leaders. On the other hand, schools may be viewed as institutions that allow for the individual expression and creativity of students. Under this perception, students learn not only by what schools choose to teach them, but also by experimenting, exploring, and freely expressing thoughts.

This tension has confounded both modern scholars and federal courts. While some scholars argue for primary and secondary school students to have greater liberty, others take the distinctly opposing view. Professor Stanley Ingber, for example, has asserted that while both visions play important roles in education, the vision of schools as tolerating open expression must not be ignored. Ingber has stated:

Given our constitutional mandate, our educational goals should not be limited to imparting to children useful information and transmitting to them the cultural norms of the past . . . . Authority and obedience may aid the efficient pursuit of some of our goals, but if free speech is neglected in the day-to-day contexts so central to the character-forging experiences of our impressionable youth, we risk breeding caution and stifling initiative, thereby fostering only the virtue of obedience.<sup>228</sup>

Ingber, however, does not have a monopoly on the scholarly debate over the role of free expression in primary and secondary schools. Indeed, Beverly L. Hall, the former deputy schools chancellor of the New York City school system, has argued that a school setting that is overly tolerant of student speech hinders students' educational development. According to Hall, "most students in our public schools appreciate boundaries and are themselves not happy or productive in an atmosphere where they feel that 'anything goes.'"<sup>229</sup> In

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<sup>228</sup> *Id.* at 455. Professor Richard L. Roe, among others, has also argued that student speech in secondary schools deserves greater First Amendment protection, given the vital educational value of diverse expression. See Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1276 (1991) ("[A]n understanding of the work of the schools as conceptual development necessitates a high degree of tolerance for student speech under the protection of the first amendment."); see also Lush, *supra* note 16, at 126 (arguing that public school students' rights should be expanded because students are confined within the school setting and thus their rights deserve the greatest protection).

<sup>229</sup> Hall, *supra* note 20, at 516; see also Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 104 (1996) ("Public schools—if they are to continue as an institution—simply must be allowed to keep order."); Hafén & Hafén, *supra* note 20, at 413 ("[T]he decline in U.S. student academic achievement during the 1970's and 1980's is clearly linked to the

her experience as a school administrator in various schools and school districts, Hall continued, "in schools where student achievement is good, established parameters exist that govern student conduct," whereas "when you visit low-performing schools and question the children or their parents, you will receive an overwhelming response that the reason the school is in such poor condition is that no one is enforcing a code or standard of behavior."<sup>230</sup>

Federal courts today, especially the Supreme Court, have endorsed firmly the reasoning of Hall and others who argue for limited free speech rights in primary and secondary schools. The Court's modern conception of limited free speech rights in those schools is in sharp contrast to the free speech rights that currently exist on college campuses. While the Court did not always hold such a restrictive view of First Amendment protection for public school students, as illustrated by its opinion in *Tinker*, the matter is well settled today. Indeed, *Tinker's* conception of public school education is largely ignored by the current Court. In *Tinker*, upholding students' right to wear symbolic black armbands in school, the Court stated that the Constitution requires schools to allow free expression even at the risk of argument or disturbance.<sup>231</sup> The Court stated, "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."<sup>232</sup>

Subsequent Supreme Court cases, however, have chiseled away at the notion invoked in *Tinker* that freedom of expression enhances the educational mission of the nation's primary and secondary schools.<sup>233</sup> The Court in *Fraser* approvingly cited an academic text and a prior Supreme Court case endorsing the "civic republicanism" notion of

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decline in school authority that followed in the wake of *Tinker* and the anti-authoritarian era it symbolized."); Hymowitz, *supra* note 20, at 554 ("What is often forgotten in the contemporary scholarly literature on childhood is that a society must shape the childhood it needs.").

<sup>230</sup> Hall, *supra* note 20, at 515-17.

<sup>231</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>232</sup> *Id.* at 508-09.

<sup>233</sup> The current conception of secondary schools' educational mission actually harkens back to a pre-*Tinker* case, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). In *Brown*, while not addressing students' free speech rights, the Court emphasized the vital role secondary schools play in shaping the minds of students. The Court described secondary schools as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.*

public education.<sup>234</sup> Specifically, the Court quoted *The Beards' New Basic History of the United States*: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."<sup>235</sup>

The Court in *Fraser* also referred to its earlier decision in *Ambach v. Norwick*,<sup>236</sup> where it described the objective of public education as the "[inculcation of] fundamental values necessary to the maintenance of a democratic political system."<sup>237</sup> Thus, while acknowledging that students do have certain rights, according to the Court in *Fraser*, those rights can be restricted when they interfere with a school's responsibility to teach students "the boundaries of socially appropriate behavior" and "the shared values of a civilized social order."<sup>238</sup> The Court not only reaffirmed that principle in *Hazelwood*, but also firmly established it as a defining characteristic of modern public school education, a characteristic that has been relied on repeatedly in the lower federal courts.<sup>239</sup> Indeed, the Court in *Hazelwood* stated that if schools could not regulate certain student speech, "the schools would be unduly constrained from fulfilling their role" as the primary instrument in shaping the nation's children.<sup>240</sup>

Given this conception, therefore, it bears repeating briefly that the federal courts view the role of free expression on college cam-

<sup>234</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>235</sup> *Fraser*, 478 U.S. at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES* 228 (William Beard ed., rev. ed. 1968) (1944)).

<sup>236</sup> 441 U.S. 68 (1979).

<sup>237</sup> *Fraser*, 478 U.S. at 681 (quoting *Ambach*, 441 U.S. at 76-77). The Court in *Fraser* also stated that the "inculcation of these values is truly the 'work of the schools.'" *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508).

<sup>238</sup> *Id.* at 681-83.

<sup>239</sup> See *Hafen & Hafen*, *supra* note 20, at 396 ("[L]ower courts . . . have read *Hazelwood* broadly. These courts accept the Supreme Court's recognition that school officials must have broad discretion to pursue their primary educational mission of preparing children for adulthood and full integration into society." (citations omitted)).

<sup>240</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). The Court adopted this principle yet again only seven years ago, in *Vernonia School District v. Acton*, 515 U.S. 646 (1995). In *Acton*, the Court upheld the right of a school district to administer random drug tests to student athletes, stating that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id.* at 656.



puses in stark contrast to its role in primary and secondary schools. Whereas colleges historically have taken it upon themselves to cultivate creativity, experimentation, and a "marketplace of ideas," such free expression rights are less recognized in primary and secondary schools. Indeed, as the Court now firmly recognizes, those schools are primarily responsible not for encouraging exposure to a vast array of viewpoints, but rather for instilling in students particular values and principles that will prepare them for future endeavors. As a result, any attempt to extend the *Hazelwood* standard to college campuses seemingly would require an abandonment of this long-recognized distinction.

B. *College Students as Fundamentally Different from  
Primary and Secondary School Students*

In addition to the differences between the roles of free speech on college campuses and in primary and secondary schools, significant differences exist between the students of both those institutions. As a result of the inherent differences between younger students and college students, the rationales underlying *Hazelwood's* application in the primary and secondary school setting are largely illogical in the context of college campuses. The Supreme Court itself has acknowledged these distinctions, most explicitly in *Widmar v. Vincent*, when it stated, "University students are, of course, young adults. They are less impressionable than younger students . . . ." <sup>241</sup> Ten years earlier, the Court used similar language in a case upholding a federal law that provided funding to church-related colleges and universities for the construction of facilities to be used exclusively for secular educational purposes. In upholding the law, the Court noted that while pre-college students may not have the maturity to make their own decisions on religion, "[t]here is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination." <sup>242</sup>

In both *Fraser* and *Hazelwood*, furthermore, the Court, in restricting students' First Amendment rights, put significant weight on the

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<sup>241</sup> 454 U.S. 263, 274 n.14 (1981). Among lower federal courts, the Ninth Circuit, in upholding a high school's decision to prohibit the inclusion in school publications of an advertisement publicizing the services of Planned Parenthood, has recognized that "educators must have the ability to consider the 'emotional maturity of the intended audience.'" *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (quoting *Hazelwood*, 484 U.S. at 272).

<sup>242</sup> *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

maturity of the students in the high schools. Indeed, in unusually judgmental language, the Court in *Fraser* starkly displayed its belief that primary and secondary school students lack maturity when it described the student who gave the objectionable speech at the school assembly as "this confused boy."<sup>243</sup> Further addressing the perceived lack of maturity of younger students, the Court stated:

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.<sup>244</sup>

Thus, a central concern of the *Fraser* Court was the young age and accompanying immaturity of the students exposed to the objectionable speech.

The Court expressed that same concern two years later in *Hazelwood*. Indeed, the Court in *Hazelwood* asserted:

[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.<sup>245</sup>

With this principle in mind, and considering the facts at issue, the *Hazelwood* Court determined that "[i]t was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters."<sup>246</sup>

Given that *Hazelwood* put such emphasis on the relative immaturity of the students, Judge Cole, in a separate opinion in the Sixth Circuit's vacated *Kincaid* decision, argued that the majority failed to recognize the differences between high school and college students. He emphasized that the students at issue in *Hazelwood* were high school students while the students at issue in *Kincaid* were college students, and that the *Hazelwood* Court itself acknowledged a potential differ-

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<sup>243</sup> 478 U.S. at 683.

<sup>244</sup> *Id.* at 683-84 (citation omitted).

<sup>245</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>246</sup> *Id.* at 274-75.

ence in treatment for college students.<sup>247</sup> Judge Cole stated:

I believe that there is reason for courts to afford colleges and universities less deference than they do high schools. While it may be a stretch to consider college-aged students full adults, a school's concern for the "emotional maturity of the intended audience" is certainly less pressing for college students than for high school students.<sup>248</sup>

Thus, Judge Cole recognized the fundamental differences between college and high school students, a distinction that the majority in *Kincaid* failed to acknowledge. According to Judge Cole, because of that distinction it seemed illogical to apply *Hazelwood* to the facts at issue in *Kincaid*.<sup>249</sup>

Such a conclusion is supported by other factors as well, ranging from matters of common acceptance to the legal rights afforded to the nation's younger citizens. It is well known, for example, that most college students have far more freedom than younger students.<sup>250</sup> College students often live away from their parents and have greater financial independence. Furthermore, such traditional features of pre-college life, such as allowances and curfews, are typically no longer at play once a student reaches college. Additionally, the mere fact that students are not required to attend college, while primary and secondary school attendance is compulsory, weighs against the notion that college students are comparable to younger students for First Amendment purposes.<sup>251</sup>

In a similar vein, college students, due to their age, typically have far more legal rights than do public school students. As Judge Cole recognized in his separate opinion in *Kincaid*, "[m]ost students are at least eighteen years old when they enter college, an age at which society affords them some of the same rights as adults (i.e., the right to vote)."<sup>252</sup> Along with the legal right to vote, which young adults re-

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<sup>247</sup> *Kincaid v. Gibson*, 191 F.3d 719, 730 (6th Cir. 1999) (Cole, J., concurring in part and dissenting in part).

<sup>248</sup> *Id.* at 730 n.1 (Cole, J., concurring in part and dissenting in part) (quoting *Hazelwood*, 484 U.S. at 272).

<sup>249</sup> *Id.* at 730 (Cole, J., concurring in part and dissenting in part).

<sup>250</sup> See Tenhoff, *supra* note 205, at 535 ("In the university context, the focus is not on children in the public schools who need to be sheltered from harms inherent in the community at large . . . . At some point, society needs to send its young adults to face the world, with all its unpleasantness and hazards.").

<sup>251</sup> See *id.* ("[U]niversity students are not a captive audience as are high school students. Students are not required to attend college, nor are they required to be on campus during any period of time.").

<sup>252</sup> *Kincaid*, 191 F.3d at 731 n.1 (Cole, J., concurring in part and dissenting in

ceive at the age of eighteen, college students, because of their age and presumably concomitant maturity, historically have been granted several other legal rights that are unavailable to students who have yet to reach college age. For example, all college students are typically legally of age to drive, a right that is available to fewer public school students. College students also have reached the age to see R-rated movies (seventeen years old), and even the age to see X-rated movies (eighteen years old), as well as to serve in the military (eighteen years old). Moreover, by the time many college students have reached their junior and senior years, they are often of age to consume alcohol, a right that is usually not available to any public school student.<sup>253</sup>

Kay S. Hymowitz highlights the perceived limited maturity of, and legal rights available to, high school students in recent decades by comparing those students with their counterparts in earlier times. Hymowitz asserts:

[T]here have been many places and times where a fifteen-year-old would be viewed as an adult. In the middle ages and in pre-modern tribes and villages all over the world, fifteen-year-olds could be soldiers, dukes, farmers, married, and parents. Only a century ago in this country it was immigrant children, not their mothers, who were the families' second wage earners. A study of working class families in Massachusetts in the 1870s found that children as young as ten were providing a quarter of the family budget. Between 1880 and 1910, manufacturers were still reporting about one-quarter of their workforce was under sixteen.<sup>254</sup>

Such responsibilities, Hymowitz continues, are no longer the norm in American society. Rather, "[t]eenagers, as we came to call them after World War II, are a very recent Western invention."<sup>255</sup>

### C. *College Publications as Public Forums*

Applying the *Hazelwood* standard to college speech also proves problematic in light of the public forum analysis. This is the case because the courts have consistently held that secondary school media are not public forums, while college campuses have many more char-

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part).

<sup>253</sup> See Abrams & Goodman, *supra* note 109, at 728 (arguing that federal courts likely will be reluctant to extend *Hazelwood* to college speech because "[college] students are, in fact, young adults with full legal rights in our system (save, in most states, the right to drink)"); Tenhoff, *supra* note 205, at 535 ("American society bestows upon new adults full legal rights and responsibilities . . .").

<sup>254</sup> Hymowitz, *supra* note 20, at 553-54.

<sup>255</sup> *Id.* at 554.

acteristics of a public forum. Central to the determination of the students' First Amendment rights in *Hazelwood*, *Kincaid*, and similar cases was whether the publications at issue were public forums. The type of forum that a government entity has created determines to what extent First Amendment rights are protected.

### 1. Three Types of Forums

The Supreme Court currently recognizes three types of forums, as outlined in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.<sup>256</sup> Such places as parks and streets, "places which by long tradition or by government fiat have been devoted to assembly and debate," are traditional public forums.<sup>257</sup> In such a forum, the government's permissible restrictions on speech are few. In order to restrict content-based speech in a public forum, the government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."<sup>258</sup> Furthermore, the government "may also enforce regulation of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>259</sup>

The second type of forum is a "limited public forum," which consists of public property that the government has opened on a limited basis for expressive use by the public, even if it was not required to do so in the first place.<sup>260</sup> In such a forum, the government can limit the use to certain groups or certain subject matters.<sup>261</sup> Once the government has created a limited public forum, "it is bound by the same standards as apply in a traditional public forum."<sup>262</sup> As a result,

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<sup>256</sup> 460 U.S. 37 (1983).

<sup>257</sup> *Id.* at 45; see also *id.* (describing quintessential public forums as places that "have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions") (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 46.

<sup>261</sup> See *id.* at 46 n.7 ("A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects." (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981), upholding a state university's decision to prohibit the use of university-provided meeting places for religious practice and worship; and *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 176 (1976), opening school board meetings to all citizens, including nonunion teachers, for the discussion of school business)).

<sup>262</sup> *Id.* at 46.

"[r]easonable time, place, and manner regulations are permissible and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."<sup>263</sup>

The final type of forum is one that is "not held open to the general public" and thus is a nonpublic forum.<sup>264</sup> The Court has long recognized that "[p]ublic property which is not by tradition or designation a forum for public communication" does not deserve the heightened First Amendment protections provided to public and limited public forums.<sup>265</sup> In a nonpublic forum, the Court in *Perry* stated, "the State may reserve the forum for its intended purposes . . . as long as the regulation . . . is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>266</sup> Time, place, and manner regulations are also permitted.<sup>267</sup> The Court in *Perry* thus concluded that a forum is only made public if "by policy or by practice" the government has opened the forum "for indiscriminate use by the general public."<sup>268</sup>

## 2. Public Forum Doctrine Applied to High School Publications

Confronted with these three public forum categories, the Court in *Hazelwood* found the high school newspaper at issue to be a nonpublic forum. The Court referred both to *Perry* and to *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,<sup>269</sup> quoting *Cornelius'* statement that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."<sup>270</sup> With those principles in mind, the *Hazelwood* Court concluded for several reasons that the high school did not intend to open the student newspaper for indiscriminate use by the general public. First, the high school intended the newspaper as a curricular experience, as evidenced by the high school's curriculum guide and the active supervisory role played by the newspaper's advisor.<sup>271</sup> In addition, the Court rejected the argu-

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 47.

<sup>265</sup> *Id.* at 46.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 47.

<sup>269</sup> 473 U.S. 788 (1985).

<sup>270</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (quoting *Cornelius*, 473 U.S. at 802).

<sup>271</sup> *See id.* at 268 ("School officials did not deviate in practice from their policy that

ments relying on the newspaper's statement of policy and on school board policy, both of which asserted First Amendment rights. The Court determined that the policies did not reflect an intent to extend the First Amendment rights of a school-sponsored newspaper to those provided to a public forum.<sup>272</sup> With these findings, the Court concluded the high school did not intend to create a public forum with the newspaper.<sup>273</sup> As a result, the school's regulations were permissible.<sup>274</sup>

### 3. *Hazelwood* Doctrine Inapplicable to College Publications

Despite the conclusions reached in the initial *Kincaid* decisions, the *Hazelwood* analysis does not apply appropriately to college publications. First and foremost, few courts ever have applied the public forum doctrine to college publications.<sup>275</sup> Moreover, of those few courts applying the doctrine, even fewer, if any, ever have found a college publication to be a nonpublic forum.<sup>276</sup> Indeed, it appears that most courts simply have taken for granted that college publications are open to the public for free expression. The court in *Antonelli v. Hammond*, for example, stated:

The university setting of college-age students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas so that the free speech clause of the First Amendment with its underlying assumption that there is positive social value in an open forum seems particularly appropriate.<sup>277</sup>

Nonetheless, even if a court were to apply the public forum doctrine to college publications, as the courts in *Kincaid* did, the appropriate outcome would be a determination that the publication is a limited public forum, not a nonpublic forum. The central determination, as it was in *Hazelwood*, is whether the government, that is, the public university, intended the publication to be an open forum. In considering that intention, the *Hazelwood* Court relied in part

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production of *Spectrum* was to be part of the educational curriculum and a 'regular classroom activit[y].'" (italics added)).

<sup>272</sup> *Id.* at 269.

<sup>273</sup> *Id.* at 270.

<sup>274</sup> *Id.* at 276.

<sup>275</sup> Brief of Amici Curiae Student Press Law Center et al. at pt. II.A, *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999) (No. 98-5385), <http://www.splc.org/kincaidbrief.asp>.

<sup>276</sup> *Id.*

<sup>277</sup> 308 F. Supp. 1329, 1336 (D. Mass. 1970).

on the fact that the high school newspaper was a curricular exercise.

By contrast, such is rarely the case at the college level. Indeed, "a 1997 study found that only one of the 101 daily college student newspapers could be classified as 'strongly curriculum-based.'"<sup>278</sup> The Court in *Hazelwood* also emphasized the fact that the newspaper was tightly controlled by the high school through funding and oversight. Once again, such is typically not the case for college publications. Rather, most college publications are under the primary control of students, with little or no oversight from college officials. In addition, funding of college publications in many instances only comprises a small portion of the publications' revenue.<sup>279</sup> The court in *Lueth v. St. Clair County Community College* recognized such distinctions in determining that a student-run college newspaper, the *Eric Square Gazette*, was a public forum.<sup>280</sup> Contrasting the production of the college newspaper with the production of the high school newspaper in *Hazelwood*, the court in *Lueth* stated:

First, the *Gazette* does not operate in a "laboratory situation," in that the *Gazette* is not operated under the guise of a specific academic course, and exists under formal school policy as a student administered activity and not within the defendant community college's "adopted curriculum." Second, the *Gazette* is not created under the direction of a faculty member, but is instead operated entirely by student participants, particularly the Editor-in-Chief.<sup>281</sup>

Furthermore, common knowledge would suggest that college publications, especially newspapers and other widely distributed materials, reach and interact with far more individuals than do high school publications. Indeed, college newspapers and yearbooks today are widely acknowledged as outlets for student expression.<sup>282</sup>

Given these differences, the district court and vacated circuit

<sup>278</sup> Brief of Amici Curiae at pt. II.A, *Kincaid* (No. 98-5385) (citing John v. Bodle, *The Instructional Independence of Daily Student Newspapers*, JOURNALISM & MASS COMM. EDUCATOR, Winter 1997, at 16).

<sup>279</sup> See Tenhoff, *supra* note 205, at 514 (stating that the majority of a university newspaper's funding comes from advertising revenue and explaining that some newspapers only receive university funding when advertising revenue is insufficient).

<sup>280</sup> See 732 F. Supp. 1410, 1415 (E.D. Mich. 1990) (citing the fact that the newspaper in question was "freely distributed throughout the local community, and [sought] outside advertisers to aid in the funding of the paper's publication" as one of three factors relevant to determining that the paper was a forum for public expression).

<sup>281</sup> *Id.*

<sup>282</sup> See Brief of Amici Curiae at pt. II.C, *Kincaid* (No. 98-5385) (discussing various cases in which a college newspaper was recognized to be a public forum and arguing that yearbooks should also be recognized as public forums).



court opinions in *Kincaid* are fundamentally flawed. Both the district court and the circuit court relied on *Hazelwood* to conclude that *The Thorobred* was a nonpublic forum. As previously discussed, the circuit court found sufficient evidence indicating KSU's intent to treat the yearbook as a nonpublic forum. That evidence included the facts that KSU's Student Handbook discussed the control the University has over student publications and that the Handbook requires a disclaimer for the student newspaper, but not for the yearbook. At the same time, the court found unconvincing the evidence offered by the students attempting to establish the yearbook as a public forum.

Such a conclusion was inaccurate, first, because *The Thorobred* was significantly different from the newspaper in *Hazelwood*. Specifically, *The Thorobred* was produced by students on their own time as an extra-curricular activity with no educational component attached. In addition, while the yearbook had a faculty advisor, that role was limited and the primary responsibilities were left to the students.<sup>283</sup> Beyond the specific facts surrounding *The Thorobred*, it bears repeating that most college yearbooks are generally open to broad expression. Many yearbooks, for example, include personal student messages from graduating seniors, extensive coverage of both campus and world news, and advertisements from throughout the community. *The Thorobred* is no different. Indeed, one of the main reasons for its confiscation was the inclusion of news coverage related not only to KSU but also to the world. As Judge Cole argued in his separate opinion:

A yearbook is a student publication constructed by students, intended for students. It reflects their perspective of the college experience, evidenced, for example, by the fact that upperclasspersons are allowed to include a personal caption with their individual class photograph, the content of which may or may not be a "KSU-sponsored representation of student life."<sup>284</sup>

Unlike his two colleagues who also ruled in *Kincaid* before the decision was vacated, Judge Cole correctly argued that *The Thorobred* should be treated as a limited public forum, a classification that the majority ignored.<sup>285</sup> Judge Cole criticized the majority's reliance on the distinction KSU had made between the yearbook and the newspaper regarding disclaimers, arguing that "[i]t does not make sense to

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<sup>283</sup> See *id.* at pt. II.D (arguing that the "guidelines establish KSU's intent to give the student full editorial control").

<sup>284</sup> *Kincaid v. Gibson*, 191 F.3d 719, 731 n.2 (6th Cir. 1999) (Cole, J., concurring in part and dissenting in part).

<sup>285</sup> *Id.* at 731 (Cole, J., concurring in part and dissenting in part).

infer the university's intent" from the distinction.<sup>286</sup> In addition, Judge Cole accurately noted that the University's Student Handbook required that any changes ordered by the University's Student Publications Advisor "must deal only with the form or the time and manner of expressions rather than alteration of its content."<sup>287</sup> Such language, Judge Cole emphasized, was remarkably similar to the definition in *Perry* of a limited public forum.<sup>288</sup>

*The Thorobred*, like other college publications, is thus most aptly labeled a limited public forum. As a result, the University should have been required to prove that its content-based regulations were narrowly drawn to effectuate a compelling state interest. The University's offered reasons for the confiscation of the yearbooks would not have met this standard. Indeed, the KSU officials made no contention that the yearbooks were confiscated because they were obscene or because they were likely to cause a substantial campus disruption, both of which might be grounds for regulating a limited public forum. Rather, the University relied primarily on objections to the yearbook's content and on a perceived lack of quality.

Such justifications do not suffice for First Amendment purposes.<sup>289</sup> Both the Fourth and Fifth Circuits, for example, rejected similar justifications in *Joyner v. Whiting*<sup>290</sup> and *Schiff v. Williams*,<sup>291</sup> respectively. In *Joyner*, the court held that a university could not withdraw financial support of a student newspaper because it objected to the inclusion of racially sensitive content in the publication.<sup>292</sup> Similarly, the court in *Schiff* prohibited a university's dismissal of the student editors of a campus newspaper on the grounds that the newspaper was of poor quality.<sup>293</sup> Such holdings demonstrate that the federal courts have required significantly greater justifications for restricting free speech on college campuses than in secondary schools.

<sup>286</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>287</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>288</sup> *Id.* (Cole, J., concurring in part and dissenting in part).

<sup>289</sup> See Brief of Amici Curiae at pt. III.B, *Kincaid* (No. 98-5385) (discussing the absence of "special circumstances" which would permit KSU to circumvent the constitutionally-protected right of students' to engage in free speech).

<sup>290</sup> 477 F.2d 456 (4th Cir. 1973).

<sup>291</sup> 519 F.2d 257 (5th Cir. 1975).

<sup>292</sup> See 477 F.2d at 460 ("[I]f a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.").

<sup>293</sup> See 519 F.2d at 261 (holding that technical errors in the newspaper were not significantly related to the maintenance of order and discipline at the school, and thus were insufficient to justify the actions taken).

#### D. Potential Chilling Effect on College Campuses

Were the federal courts to restrict those First Amendment rights on college campuses, nothing short of a chilling effect on diverse expression and academic freedom would result. The Student Press Law Center already has established that the incidences of censorship in the nation's secondary schools have increased significantly since *Hazelwood*. For instance, between 1988, the year of the Supreme Court's *Hazelwood* decision, and the end of 1996, the number of inquiries to the Student Press Law Center from public school student journalists and their advisors rose 163%.<sup>294</sup> Extending *Hazelwood* to college campuses would have the same effect. Moreover, the ever expanding application of *Hazelwood* in secondary schools could also occur on college campuses, resulting in regulation not only of college newspapers and yearbooks, but also potentially of student theatrical productions, college libraries and even faculty expression.

The federal courts have already allowed such restrictions in secondary schools. In *Virgil v. School Board of Columbia County*, for example, the Eleventh Circuit upheld a school board's decision to ban two books, Aristophanes' *Lysistrata* and Geoffrey Chaucer's *The Miller's Tale*, from the school library because of their alleged "vulgarity and sexual explicitness."<sup>295</sup> Similarly, the Fourth Circuit in *Boring v. Buncombe County Board of Education* upheld a school administration's decision to censor a teacher's selection of an extracurricular play.<sup>296</sup> The Supreme Court has appeared to recognize the danger in extending such standards to college campuses. In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court, in prohibiting the University of Virginia from refusing to fund the printing of a student religious newspaper, stated:

Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University says it does, those student journalistic efforts that primarily manifest or promote a belief that there is no deity and no ultimate reality, then undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications.<sup>297</sup>

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<sup>294</sup> Brief of Amici Curiae at pt. I.B.ii, *Kincaid* (No. 98-5385).

<sup>295</sup> 862 F.2d 1517, 1518 (11th Cir. 1989).

<sup>296</sup> 136 F.3d 364, 366 (4th Cir. 1998) (en banc).

<sup>297</sup> 515 U.S. 819, 836-37 (1995) (citation omitted).

Free speech regulations like those attempted in *Rosenberger* thus undoubtedly would have a chilling effect on college campuses under a *Hazelwood* standard. Indeed, the notion of a "marketplace of ideas" on the nation's college campuses likely would be no more.

#### IV. CONCLUSION: LIKELIHOOD OF *HAZELWOOD*'S EXTENSION

The question remains whether the Supreme Court will extend *Hazelwood* to universities. Support exists for both sides of the proposition. On one hand, such an extension is not all that implausible. In the oft-cited footnote seven of its decision, the *Hazelwood* Court itself acknowledged the possibility of extending its holding to college speech: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."<sup>298</sup> Had the Court automatically concluded that such an extension were inappropriate, it would be logical to assume that the Court would not have included footnote seven in its opinion. Instead, the inclusion of footnote seven seems to suggest a possible extension to college speech.

Two other factors support this possibility. First, the *Hazelwood* Court emphasized that the high school's censorship was permissible because the regulated speech was "school-sponsored." Had the speech not been associated with the high school, the school's actions likely would not have passed constitutional muster. However, because the newspaper was part of the school's curriculum and received funding from the school, the regulation was permissible. Should the Supreme Court put such an emphasis on similar "school sponsorship" factors in another case, *Hazelwood* very likely could be extended to college speech. Such a result could occur because many forms of speech on college campuses fit the *Hazelwood* definition of "school-sponsored" expression. Many college newspapers, for example, receive some sort of university funding. While most college newspapers rely heavily on advertising revenue, some newspapers also receive financial support through mandatory student activity fees.<sup>299</sup> Additionally, newspapers at some colleges receive rent-free or reduced-rent use of university fa-

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<sup>298</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 n.7 (1988).

<sup>299</sup> For example, the college newspapers at issue in *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983), *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), and *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), received funding through mandatory student activity fees. See also Tenhoff, *supra* note 205, at 514 ("At some universities, student fees support the newspaper when advertising revenues fail to meet publishing costs.").

cilities.<sup>300</sup> Under the *Hazelwood* analysis, such school support conceivably could turn material in college newspapers into "school-sponsored" speech for First Amendment purposes.

The second means by which *Hazelwood* potentially could be applied to college speech is based on the Supreme Court's deference to the decisions of public school officials. Under this rationale, were a college to censor student speech, a court would be reluctant to intervene because educators' decisions deserve "substantial deference."<sup>301</sup> That deference has a long history in the Court's jurisprudence. At least as far back to 1968, the Court recognized: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."<sup>302</sup> While the Court has shown such deference to secondary schools multiple times, the reasons for doing so, including the presumably greater knowledge of educational issues possessed by school officials in comparison to the federal courts, would seem to apply to administrative decisions at the college level as well.

Nonetheless, in order to apply *Hazelwood* to speech on college campuses, the Supreme Court ostensibly would have to reject significant precedent. Specifically, as discussed in Part III, the Court would have to reconcile the vastly different approaches it has taken toward free expression at the college level as opposed to the secondary school levels. At the same time, the Court would have to address the fundamental differences between college students and secondary school students. Finally, the Court would have to recognize the chilling effect the extension of *Hazelwood* could have on the "marketplace of ideas" philosophy currently embedded in the nation's college campuses. Whether the Supreme Court, or any other federal court, would take those steps remains an open question. Perhaps, the Court

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<sup>300</sup> Tenhoff, *supra* note 205, at 514.

<sup>301</sup> *Hazelwood*, 484 U.S. at 273 n.7; *see also* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982) ("We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973))); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

<sup>302</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

ultimately will answer *Hazelwood's* footnote seven in the negative, putting a definitive end to such concern. Only then would colleges and universities maintain their status as the country's "marketplace of ideas."